EDITOR'S NOTE

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No. 96-8400

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IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

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DOUGLAS MACARTHUR BUCHANAN, JR.
*Petitioner*,

v.

RONALD J. ANGLEONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
*Respondent*,

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SUPREME COURT, U.S.

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**On Petition for a Writ of Certiorari**
**United States Court of Appeals**
**for the Fourth Circuit**

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**APPENDICES A-D**

**Imminent Execution Scheduled**
**April 8, 1997**

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103 F.3d 344
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**Douglas McArthur BUCHANAN, Jr., Petitioner-Appellant,**
**v.**
**Ronald J. ANGELONE, Director, Virginia Department of Corrections; Commonwealth of Virginia, Respondents-Appellees.**
**No. 96-4.**

United States Court of Appeals,
Fourth Circuit.
Argued Oct. 30, 1996.
Decided Dec. 30, 1996.

After convictions for capital murder, three first-degree murders, and firearm offenses were affirmed, 238 Va. 389, 384 S.E.2d 757, petitioner sought writ of habeas corpus. The United States District Court for the Western District of Virginia, James C. Turk, J., denied petition. Petitioner appealed. The Court of Appeals, Butzner, Senior Circuit Judge, held that: (1) sentencing instruction in capital case did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence; (2) nonspecific instruction on mitigating evidence was consistent with state sentencing statute; (3) exclusion of hearsay testimony offered by defendant's expert during sentencing hearing did not violate defendant's right to present mitigating evidence; (4) pleading guilty to murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution; (5) petitioner failed to show that his constitutional rights were violated on ground that state Supreme Court's review was inadequate; and (6) petitioner failed to meet exhaustion requirement for claim that trial court's refusal to instruct on second-degree murder violated due process.

Affirmed.

**[1] CRIMINAL LAW k1213.7**
110k1213.7
Sentencing instruction in capital case, informing jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence, when jury, in its verdict, certified that it had considered evidence in mitigation of offense, as required by Virginia law. U.S.C.A. Const.Amend. 8; Va.Code 1950, s 19.2-264.4.

**[1] HOMICIDE k311**
203k311
Sentencing instruction in capital case, informing jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence, when jury, in its verdict, certified that it had considered evidence in mitigation of offense, as required by Virginia law. U.S.C.A. Const.Amend. 8; Va.Code 1950, s 19.2-264.4.

**[2] CRIMINAL LAW k1213.7**

**APPENDIX**
**A**



110k1213.7
Eighth Amendment requires that capital sentencing jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of death penalty, thus eliminating total arbitrariness and capriciousness in its imposition; to accomplish this purpose, capital sentencing jury must be properly instructed. U.S.C.A. Const.Amend. 8.

**[2] CRIMINAL LAW k1213.8(8)**
110k1213.8(8)
Eighth Amendment requires that capital sentencing jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of death penalty, thus eliminating total arbitrariness and capriciousness in its imposition; to accomplish this purpose, capital sentencing jury must be properly instructed. U.S.C.A. Const.Amend. 8.

**[3] CRIMINAL LAW k1213.7**
110k1213.7e imprisonment if it did not believe that death penalty was justified, was consistent with Virginia sentencing statute, which did not impose obligation to instruct jury about specific mitigating factors; instruction thus did not violate defendant's federal due process rights. U.S.C.A. Const.Amend. 14; Va.Code 1950, s 19.2-264.4.

**[4] HOMICIDE k311**
203k311
Nonspecific mitigation sentencing instruction in capital case, which informed jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, was consistent with Virginia sentencing statute, which did not impose obligation to instruct jury about specific mitigating factors; instruction thus did not violate defendant's federal due process rights. U.S.C.A. Const.Amend. 14; Va.Code 1950, s 19.2-264.4.

**[5] CONSTITUTIONAL LAW k270(1)**
92k270(1)
In context of discretionary sentencing by jury, denial of state procedural right may rise to level of federal due process violation. U.S.C.A. Const.Amecomplete. emotional stress in committing murders, and thus were cumulative, defendant rejected trial court's offer to continue case and summon declarants, and excluded statements lacked inherent reliability. U.S.C.A. Const.Amend. 14.

**[6] HOMICIDE k358(1)**
203k358(1)
Exclusion of hearsay testimony offered by defendant's expert during sentencing hearing in capital case did not violate defendant's due process right to present mitigating evidence; compelling circumstances mandating admission of hearsay did not exist, in that statements were offered only to provide additional support for expert's conclusion that defendant acted under extreme emotional stress in committing murders, and thus were cumulative, defendant rejected trial court's offer to continue case and summon declarants, and excluded statements lacked inherent reliability. U.S.C.A. Const.Amend. 14.

**[7] CRIMINAL LAW k641.13(5)**

110k641.13(5)
Pleading guilty to four first-degree murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution, even though defendant was charged with murders and capital murder in separate indictments; therefore, counsel was not incompetent for failing to recommend this course of action, so as to permit defendant to avoid death penalty, nor was defendant prejudiced by pleading not guilty. U.S.C.A. Const.Amends. 5, 6.

**[7] DOUBLE JEOPARDY k167**
135Hk167
Pleading guilty to four first-degree murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution, even though defendant was charged with murders and capital murder in separate indictments; therefore, counsel was not incompetent for failing to recommend this course of action, so as to permit defendant to avoid death penalty, nor was defendant prejudiced by pleading not guilty. U.S.C.A. Const.Amends. 5, 6.

**[8] CONSTITUTIONAL LAW k271**
92k271
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged in independent review of the record, by which it necessarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 14; Va.Code 1950, s 17-110.1, subd. C, par. 1.

**[8] CRIMINAL LAW k1208.1(6)**
110k1208.1(6)
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged isarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 14; Va.Code 1950, s 17-110.1, subd. C, par. 1.

**[8] CRIMINAL LAW k1213.7**
110k1213.7
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged in independent review of the record, by which it necessarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 197k366
Habeas corpus petitioner failed to meet exhaustion requirement for claim that trial court violated his federal due process rights by refusing to instruct on second-degree murder when he failed to raise issue in direct appeal to state Supreme Court. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. s 2254.



**[14] HABEAS CORPUS k312**
197k312
Failure of federal habeas corpus petitioner to raise federal claim in state court bars federal review of omitted claim. 28 U.S.C.A. s 2254.

*346 ARGUED: Gerald Thomas Zerkin, Gerald T. Zerkin & Associates, Richmond, VA, for Appellant. Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, VA, for Appellees. ON BRIEF: Donald R. Lee, Virginia Capital Representation Resource Center, Richmond, VA; Frank K. Friedman, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, VA, for Appellant. James S. Gilmore, III, Attorney General of Virginia,ies, he petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. s 2254. In his petition, he alleged numerous constitutional defects in the state court proceedings. The district court denied the petition. On appeal, Buchanan presents five issues for review. After careful consideration of his contentions and the record, we find no reversible error and affirm the district court's disposition.

I

On the afternoon of September 15, 1987, Buchanan murdered his father, his stepmother, and his two half brothers. The Virginia Supreme Court's opinion recounts the details of the crime. Buchanan v. Commonwealth, 238 Va. 389, 394-96, 384 S.E.2d 757, 760-61 (1989).

Buchanan was charged with capital murder for the killing of "more than one person as part of the same act or transaction." Va.Code Ann. s 18.2- 31(7) (Michie 1996). In four separate indictments, the grand jury also charged him with the first degree murder of each victim. In ad and to a term of imprisonment for the firearm offenses. The circuit court imposed the recommended sentences.

Buchanan appealed to the Supreme Court of Virginia. The court vacated the redundant conviction of first degree murder for the killing of Buchanan's father and affirmed the other convictions and the related sentences, including the death penalty. Buchanan, 238 Va. at 418, 384 S.E.2d at 774. The United States Supreme Court denied certiorari. Buchanan v. Virginia, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990).

Buchanan then petitioned for a writ of habeas corpus in the Circuit Court of Amherst County. After the circuit court dismissed his petition, he appealed to the Supreme Court of Virginia, which also denied the petition. The United States Supreme Court again denied certiorari. Buchanan v. Murray, 506 U.S. 988, 113 S.Ct. 501, 121 L.Ed.2d 437 (1992).

Buchanan sought a writ of habeas corpus in federal district court, which denied relief. On appeal, Buchanan now asserts five claims, one relating to the competence of his trial counsel, three alleging errors in his trial, and one challenging the adequacy of the Virginia Supreme Court's appellate review.

II

[1] Buchanan's first claim is that the sentencing jury was inadequately instructed about mitigating evidence. With regard to mitigation, the court told the jury: "[I]f you believe from

all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." In addition, the statutory verdict form required the jury to indicate that it had "considered the evidence in mitigation of the offense."

At trial Buchanan asked the court to give a more detailed instruction on mitigation. Specifically, he asked the court to tell the jury that it should consider as mitigating factors his youth, his clean criminal record, and whether he was "under the influence of extreme mental or emotional disturbance" when he committed the crime. Each of these factors is designated as mitigating evidence by Virginia Code s 19.2-264.4 (Michie 1996). During the sentencing hearing Buchanan submitted evidence supporting each factor, and Buchanan's counsel was permitted to discuss the factors in his closing argument.

Buchanan now argues that the trial court's failure to instruct the jury about the specific mitigating factors supported by his evidence violated his constitutional rights in two ways. His first argument rests on the Eighth Amendment. In his view, the trial court's nonspecific instruction did not appropriately channel the jury's discretion so as to avoid an arbitrary or capricious outcome.

[2][3] The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). To accomplish this purpose, a capital sentencing jury must be properly instructed. Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 2749- 50, 77 L.Ed.2d 235 (1983).

Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In Clozza v. Murray, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." 913 F.2d 1092, 1105 (4th Cir.1990). In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. Jones v. Murray, 947 *348 F.2d 11t it had "considered the evidence in mitigation of the offense." In Jones, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure ... satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." 947 F.2d at 1120. In light of this precedent, Buchanan's Eighth Amendment claim must fail.

[4] Buchanan's second argument asserts a federal due process violation. According to Buchanan, the trial court's nonspecific mitigation instruction was inconsistent with Virginia's death penalty sentencing statute and, as a result, denied him the benefit of the Commonwealth's statutory sentencing scheme. Buchanan argues that this alleged violation of state law infringed his rights under the Due Process Clause.

[5] It is true, at least in the context of discretionary sentencing by a jury, that denial of a state procedural right may rise to the level of a federal due process violation. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229 30, 65 L.Ed.2d 175 (1980). However, there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the senttute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. See, e.g., LeVasseur v. Commonwealth, 225 Va. 564, 594-95, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute, Buchanan's due process argument must also fail.

III

[6] The second claim advanced by Buchanan is that the trial court impermissibly limited his ability to present mitigating evidence at the sentencing hearing. This claim is based on the trial court's exclusion of hearsay testimony offered by Buchanan's expert witness, Dr. Robert Brown.

Dr. Brown was Buchanan's principal mitigation witness. In preparation for trial, he performed a psychological evaluation of Buchanan and extensively investigated his personal and family history. As part of his investigation, he interviewed many of support for his position, he relies on Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

Based on the "unique circumstances" present in Green, the Court held that Georgia's admittedly proper application of its hearsay rule during the sentencing phase of a death penalty trial violated the Due Process Clause. 442 U.S. at 95-97, 99 S.Ct. at 2150-52. In that case, the trial court excluded an out-of-court statement of a man who had already been convicted of capital murder for his role in the killing for which the defendant was being tried. The excluded statement, made spontaneously to a close friend, amounted to an admission that the declarant *349 alone was responsible for the killing. The Court found that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [citation omitted], and substantial reasons existed to assume its reliability." Id. at 97, 99 S.Ct. at 2151. Under those circumstances, the Court held that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' " Id. at 97, 99 S.Ct. at 2151-52 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)).

The exclusion of the hearsay statements offered by Dr. Brown does not fit within the narrow exception recognized by Green. In Green, the excluded statement strongly tended to show that the defendant was innocent. In this case, the statements were offered only for the purpose of providing additional support for Dr. Brown's conclusion that Buchanan acted under extreme emotional stress. Even without the proffered statements, Dr. Brown's testimony provided ample evidence to explain his opinion. For this reason, the statements would have had only cumulative probative value. After the trial court offered to continue the case and summon the relatives and friends whom Dr. Brown interviewed, Brown's attorney said: "I don't want to do that Judge. We have enough. I just want to object to your not allowing it in."

The excluded statements also lack the inherent reliability of the statement excluded in Green. The statement in Green was against the declarant's penal interest, made spontaneously to a close friend, and the state itself had relied on the excluded testimony to convict the declarant of capital murder. At Buchanan's trial, these compelling circumstances do not appear.

The evidence in this case discloses that the application of Virginia's hearsay rule did not rise to the level of a constitutional violation.

IV

[7] Buchanan's third claim is that his trial counsel was ineffective because he failed to take advantage of what Buchanan sees in retrospect as a certain opportunity to have avoided a death sentence. Buchanan contends that, if he had pleaded guilty to the four first degree murder indictments, the constitutional guarantee against double jeopardy would have precluded any further prosecution based on the same killings. This means, he argues, that the Commonwealth could not have prosecuted the capital murder indictments. Because Buchanan's sole objective

throughout the criminal proceeding was to avoid the death penalty, he claims that his trial counsel's failure to recognize this opportunity deprived him of his Sixth Amendment right to counsel.

Contrary to Buchanan's assertion, pleading guilty to the first degree murder indictments would not have precluded the Commonwealth from prosecuting the capital charges. The Supreme Court addressed a nearly identical issue in Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). In that case, the defendant pleaded not guilty to the murder and aggravated robbery charges against him and, at the same time, pleaded guilty to the lesser included offenses of involuntary manslaughter and grand theft. The trial court accepted the guilty pleas, sentenced the defendant, and then dismissed the murder and aggravated robbery charges on double jeopardy grounds. Id. at 494, 104 S.Ct. at 2538. On appeal, the Supreme Court of Ohio affirmed. The Supreme Court of the United States reversed, holding that pleading guilty to the lesser included offenses did not bar the state from prosecuting the greater offenses since all of the charges were brought in a single prosecution. Id. at 497-502, 104 S.Ct. at 2539-43.

Buchanan asserts that Johnson is inapplicable. He points out that in Johnson all of the charges were brought in a single indictment. In this case, on the other hand, Buchanan was charged with first degree murder and capital murder in separate indictments.

The distinction drawn by Buchanan would not have made any difference. In Johnson, the Court found that permitting the state to pursue the greater charges, even after the defendant pleaded guilty to the lesser charges, did not implicate any of the interests protected by the Double Jeopardy Clause. The Court noted that, by pleading ***350** guilty to the lesser included offenses, the defendant "has not been exposed to conviction completing its prosecution on the remaining charges." Id. at 502, 104 S.Ct. at 2542. While it is true that Johnson involved a single indictment with multiple counts, the Court's reasoning applies equally to a case involving multiple indictments brought in a single prosecution. By itself, the fact that the Commonwealth charged Buchanan in separate indictments does not constitute the type of "governmental overreaching that double jeopardy is supposed to prevent." Id. at 502, 104 S.Ct. at 2542.

Buchanan argues that, under Virginia law, he had an absolute right to plead guilty at any time to the entirety of any indictment against him. He relies on Graham v. Commonwealth, 11 Va.App. 133, 137-40, 397 S.E.2d 270, 273 (1990), but his reliance is misplaced. The Virginia Court of Appeals explained that a plea of guilty to a lesser included offense would not bar prosecution of a greater offense pending in the same prosecution: The only discretion given to a court by the statute is the right toquent case. The Virginia Court of Appeals held that pleading guilty to a first degree murder indictment does not preclude the simultaneous prosecution of a capital murder indictment involving the same transaction. Rea v. Commonwealth, 14 Va.App. 940, 943-45, 421 S.E.2d 464, 466-68 (1992) (relying on Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425).

Against this background, it is evident that Buchanan's right to counsel was not violated. The Sixth Amendment right to counsel guarantees effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). In order to establish deprivation of this right, a criminal defendant must show both that counsel acted incompetently and that counsel's incompetence was prejudicial. Id. at 687, 104 S.Ct. at 2064.

Because there was no reason to believe that pleading guilty to the first degree indictments would have barred prosecution of the capital charges, the failure of Buchanan's counsel to recommend this course of action cannot be labelled incompetent. Additionally, since Buchanan could not have blocked prosecution of the capital charges by pleading guilty to the lesser included offenses, pleading not guilty did not prejudice him. For these reasons, we reject Buchanan's argument that his counsel was ineffective.



V

[8] Next, Buchanan asserts that the Virginia Supreme Court's review of his case was constitutionally inadequate in two respects. First, he alleges that the court failed to consider the mitigating evidence he offered. Second, he claims that the court did not conduct the proportionality review required by Virginia statute in a rational manner. He argues the first deficiency violated both his due process and Eighth Amendment rights, while the second violated his due process rights. According to Buchanan, the federal due process violations arise because the Virginia Supreme Court improperly implemented the pertinent state statute.

[9][10] The Eighth Amendment requires that the death penalty not be imposed in an arbitrary or capricious manner. Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). Meaningful appellate review is an important safeguard against improper imposition of the death penalty. Parker v. Dugger, 498 U.S. 308, 321, 111 S.Ct. 731, 739-40, 112 L.Ed.2d 812 ***351** (1991). Consistent with those constitutional requirements, Virginia law directs the Commonwealth's highest court to review the record in every death penalty case to determine whether the sentence was "imposed under the influence of passion, prejudice or any other arbitrary factor." Va.Code Ann. s 17-110.1.C.1 (Michie 1996).

[11] The Virginia Supreme Court conducted the mandatory statutory review in this case. The court engaged in an "independent review of the record." By doing so, the court necessarily became aware of the mitigating evidence Buchanan had presented.al [ed] nothing to suggest that the death penalty was imposed ... as the result of passion, prejudice, or arbitrariness." Buchanan, 238 Va. at 418, 384 S.E.2d at 774. On collateral review, federal courts are not required to re-examine a state court's good faith findings. Cf. Walton, 497 U.S. at 656, 110 S.Ct. at 3058-59. Moreover, the district court conducted its own independent review of the record and, after specifically taking Buchanan's mitigating evidence into account, concluded that the death penalty had not been imposed arbitrarily. For these reasons, Buchanan cannot prevail on this point.

[12] Also without merit is Buchanan's claim that the Virginia Supreme Court's proportionality review was inadequate. Although the Virginia capital sentencing statute requires a proportionality review, Virginia Code s 17- 110.1.C.2, the federal Constitution does not. Pulley v. Harris, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879-80, at 769-71 (citing Virginia cases). Buchanan, however, did not contend in his direct appeal to the Virginia Supreme Court that the omitted instruction violated federal due process. As a result, the district court properly concluded that Buchanan had not met the exhaustion requirement found in 28 U.S.C. s 2254. Failure to raise a federal claim in state court bars federal review of the omitted claim. Duncan v. Henry, 513 U.S. 364, ----, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982).

Finding no error, we affirm the judgment denying Buchanan's petition for a writ of habeas corpus.

AFFIRMED.

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384 S.E.2d 757
(Cite as: 238 Va. 389, 384 S.E.2d 757)

**Douglas McArthur BUCHANAN, Jr.**
**v.**
**COMMONWEALTH of Virginia.**
**Record Nos. 890107, 890108.**
Supreme Court of Virginia.
Sept. 22, 1989.

Defendant was convicted in the Circuit Court, Amherst County, Robert C. Goad, J., of capital murder for killing his father in the same transaction in which he killed his stepmother and two half brothers, and of first-degree murders of his father, brothers, and stepmother. Defendant appealed. The Supreme Court, Thomas, J., held that: (1) capital murder indictments gave defendant sufficient notice of charges; (2) second indictment was redundant; (3) trial court properly directed that in opening statements counsel were to say no more than that defendant had been charged with capital murder; (4) trial court properly denied request to read statement, designed to cushion effect of questioning prospective jurors about death penalty; (5) refusal to permit individual voir dire outside presence of spectators and press was proper; (6) defendant had full and fair opportunity to ascertain whether prospective jurors stood indifferent to the case; (7) trial court showed no partiality in selection of jurors; (8) defendant had no right to additional peremptory strikes; (9) change of venue was properly denied; (10) request for sequestration of jury was properly denied; (11) defendant was not entitled to second-degree murder instructions; (12) death penalty statute was constitutional; (13) capital murder statute was constitutional; (14) statute requiring vileness for death penalty imposition was constitutional; (15) defendant was not sentenced to multiple punishments for same offense; and (16) first-degree murder conviction for killing of father violated double jeopardy.

Affirmed in part, vacated in part.

**[1] CRIMINAL LAW k29(14)**
110k29(14)
Commonwealth was free to indict defendant for as many separate counts of capital murder as Commonwealth thought it could prove and was thus free to charge the commission of capital murder in several different ways with multiple alternative indictments. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

**[2] INDICTMENT AND INFORMATION k132(2)**
210k132(2)
Second capital murder indictment, which put defendant on notice that he could be convicted if jury believed he had killed his father and his brother as part of the single transaction or believed he had killed his father and stepmother as part of the same transaction, was redundant becausct that in opening statements counsel were to say no more than that defendant had been charged with capital murder for the killing of more than one person as part of the same act or transaction, where possibility existed that jury might not be instructed on each of eleven indictments. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

**APPENDIX**
**A**

**[5] JURY k131(13)**
230k131(13)
Trial court had discretion to refuse to read to prospective jurors a statement designed to cushion the effect of questioning prospective jurors about death penalty. Code 1950, s 8.01-358; Sup.Ct.Rules, Rule 3A:14.

**[6] CRIMINAL LAW k635**
110k635
Defendant had no right to individual voir dire outside the presence of spectators and press.

**[6] JURY k131(13)**
230k131(13)
Defendant had no right to individual voir dire outside the presence of spectators and press.

**[7] JURY k131(17)**
230k131(17)
Voir dire questions related to prospective juror's impressions of case and appropriateness of death penalty were properlydditional peremptory strikes. Code 1950, s 19.2-262.

**[10] CRIMINAL LAW k137**
110k137
Trial court properly attempted to seat jury before ruling on motion to change venue.

**[11] CRIMINAL LAW k126(1)**
110k126(1)
Trial court properly denied motion for change in venue, where jury selection was relatively easy, publicity was accurate and noninflammatory, and there was no indication of widespread prejudice against defendant in community.

**[12] CRIMINAL LAW k854(4)**
110k854(4)
Trial court properly denied request that jury be sequestered, where court had admonished jury not to read newspapers, watch television, or discuss case with anyone and there was no indication that jurors did not follow trial court's instructions.

**[13] HOMICIDE k308(5)**
203k308(5)
Defendant, charged with capital murder, was not entitled to second-degree murder instruction with regard to each of four murders, where evidence showed conclusively that murders were deliberate, premeditated, and willful. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

**[14] CRIMINAL LAW k1206.1(2)**
110k1206.1(2)
Death penalty statute is constitutional. U.S.C.A. Const.Amend. 8.

**[15] HOMICIDE k351**

203k351
Statute under which defendant was convicted of capital murder was constitutional. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7); U.S.C.A. Const.Amend. 8.

**[16] CRIMINAL LAW k1206.1(2)**
110k1206.1(2)
Statutory provision requiring vileness for imposition of death penalty is constitutional. U.S.C.A. Const.Amend. 8.

**[17] CRIMINAL LAW k1030(1)**
110k1030(1)
Appellate court will not consider issue not objected to in trial court. Sup.Ct.Rules, Rule 5:25.

**[18] CRIMINAL LAW k29(14)**
110k29(14)
When jury found that defendant killed all four victims as part of the same act or transaction, he could be found guilty of only one capital murder. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

**[19] CRIMINAL LAW k29(14)**
110k29(14)
When defendant was convicted for capital murder of his father, as well as the first-degree murder of his father, his two half brothers, and his stepmother, he was left with five murder convictions when he killed four people and remedy was to vacate first-degree murder conviction for killing his father. Code 1950, ss 18.2-32, 18.2-31(g) (now s 18.2-31, subd. 7).

**[20] CRIMINAL LAW k486(1)**
110k486(1)
Experts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial.

**[21] CRIMINAL LAW k796**
110k796
Rule that mitigating factors mentioned in statute must not be listed benefits defendant because jury could be misled into concluding that listed factors are the only factors they could consider in mitigation.

**[22] COSTS k302.4**
102k302.4
Trial court properly refused to allow defendant to secure additional neurological testing, in effort to develop evidence in mitigation, where defendant had been previously examined and physicians then were looking for, but did not find, the), for appellant.

Virginia B. Theisen, Asst. Atty. Gen., (Mary Sue Terry, Atty. Gen., Birdie H. Jamison, Asst. Atty. Gen., on brief), for appellee.

***389** Present: All the Justices.

***393** THOMAS, Justice.

Douglas McArthur Buchanan, Jr. (Buchanan), was tried by a jury and convicted of capital murder in violation of Code s 18.2-31(g) (now Code s 18.2-31(7)), for killing his father, Douglas McArthur Buchanan, Sr. (Buchanan, Sr.), in the same transaction in which he killed his half-brother, Joel Jerry Buchanan (J.J.); his half-brother, Christopher Donald Buchanan (Donnie); and his step-mother, Geraldine Patterson Buchanan (Mrs. Buchanan). In the second phase of the bifurcated capital murder trial, the jury fixed Buchanan's sentence at death.

In the same trial, the jury also convicted Buchanan of the first degree murders of his father, hhe commission of a felony with regard to each murder, ***394** sentencing him to a total of fourteen years in prison for those convictions. Code s 18.2-53.1.

The trial court entered judgment on the capital murder conviction and sentenced Buchanan to death. It also entered judgment on the four first degree murder convictions and sentenced Buchanan to four terms of life imprisonment. In addition, the trial court entered judgment on the firearm convictions and sentenced Buchanan to fourteen years imprisonment.

Buchanan appealed the capital murder conviction to this Court. Record No. 890107. We have consolidated that appeal with the automatic penalty review required by Code s 17-110.1. Buchanan appealed the non-capital convictions to the Court of Appeals. Pursuant to Code s 17-116.06, by order dated January 30, 1989, we certified that appeal to this Court. Record No. 890108. We have consolidated all matters and have given the consolidated case priority on our docket. Code s 17-110.2.

Buchanan's principal complaints concern whether the indictments gave him fair notice of the charges against which he had to defend, whether the trial court unduly restricted voir dire questioning, whether he was entitled to second degree murder instructions, whether the jury's verdicts were sufficiently supported by the indictments, and whether his right to be free of double jeopardy was violated by the sentences he received. In our view, with certain modifications more fully explained herein, the trial court's judgment should be affirmed.

## I. FACTS

The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside ****761** where they engaged in conversation. ***395** They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heare he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing thce of the charges against which he had to defend. He argues that the various indictments permitted the jury to convict him of more than one capital murder based on the death of the same person, Buchanan, Sr. According to Buchanan, his main defense to the capital murder charges was to show that the killings were not part of the same transaction. Buchanan submits that the multiple alternative indictments created a situation in which he was never aware of which killings the Commonwealth alleged were part of the same transaction. During oral argument, Buchanan stated that the issue is not whether he knew he was on trial for capital murder; this was conceded. Rather, Buchanan submitted, the real question is how many charges of capital murder can be based on four murders and what is the proper way to frame the indictments. Defendant contends he was prejudiced because he was unable to focus his defense on a specific pair of killings as being unconnected; instead, he was forced to argue that none of the killings were part of the same transaction.

The three capital murder indictments against Buchanan were based on then Code s 18.2-31(g), which provided, in pertinent part, as follows: "The following offenses shall constitute capital murder ... (g) The willful, deliberate and premeditated killing **762 of more than one person as a part of the same act or transaction...." The first indictment charged, in essence, that Buchanan killed Buchanan, Sr. as part of the same act or transaction in which he killed J.J., Donnie, or, Mrs. Buchanan. The second indictment was in two counts; it charged, in essence, in Count I, that Buchanan killed Buchanan, Sr. and Donnie as part of the same act or transaction and in Count II, that Buchanan killed Buchanan, Sr. and Mrs. Buchanan as part of the same act or transaction. The third indictment was also in two counts; it charged, in essence, in Count I, that Buchanan killed Donnie and J.J. as part of the same act or transaction and in Count II, that *397 Buchanan killed J.J. and Mrs. Buchanan as part of the same act or transaction.

Buchanan's basic complaint is that because he killed four people in a relatively narrow time frame, he could only be indicted under Code s 18.2- 31(g) for one capital murder. He contends the Commonwealth was required to make an election among the indictments. Buchanan misreads the statute and misunderstands the law concerning indictments.

The statute described capital murder as the "willful, deliberate, premeditated killing of more than one person as a part of the same act or transaction." This means that it took the killing of at least two people as part of the same act or transaction to constitute one capital murder under Code s 18.1- 31(g). Here, four people were killed; thus, there was the theoretical possibility that Buchanan could be convicted of two capital murders. The critical issue is how many acts or transa that can be supported by four murders does not control the way in which the Commonwealth can frame indictments. The Commonwealth is free to indict an individual for as many separate crimes as the Commonwealth, in good faith, thinks it can prove. Further, the Commonwealth is free to charge the commission of a single offense in several different ways in order to meet the contingencies of proof. See Bryant v. Commonwealth, 189 Va. 310, 315, 53 S.E.2d 54, 56 (1949); R. Bacigal, Virginia Criminal Procedure s 13-6 (1983). The indictments of which Buchanan complains were proper. The Commonwealth was not required to make an election.

[2] The three indictments put Buchanan on fair notice of what he was required to defend against at trial. Under the first indictment, Buchanan was on notice that he had to defend against a claim that he killed Buchanan, Sr. and all three of the other victims as part of the same act or transaction; that he killed Buchanan, Sr. and any two of the other victims as ped Buchanan, Sr. and Mrs. Buchanan as part of the same act or transaction. This indictment was unnecessary because the first indictment provided for all possible groupings of victims in which Buchanan, Sr. was included. However, Buchanan has not described, and we do not perceive, any way in which he was prejudiced by the redundant nature of the second indictment.

[3] The third indictment was not redundant. Whereas the first and second indictments required that Buchanan, Sr. be part **763 of any grouping of two or more victims, the third indictment provided for the possibility that the jury might not believe that Buchanan, Sr. should be included as part of any grouping which was killed as part of the same act or transaction. Under the third indictment, Buchanan was on notice that he had to defend against the possibility that J.J. and Donnie were killed as part of the same act or transaction or that J.J. and Mrs. Buchanan were killed as part of the same act or transaction.

Thus, contrary to Buchanan's argument, he was never at risk of being convicted of more than one capital murder for killing the same person. The first and second indictments were in reality one indictment for capital murder in which Buchanan, Sr.'s death was a necessary part of a conviction. The third indictment permitted a conviction of capital murder in either of two situations where Buchanan, Sr.'s death did not come into play. Thus, at most, Buchanan faced conviction of two capital murders. But if he had been so convicted, there could not have been any overlap in the two pairs of murder victims on which the convictions were based. This was not a case of a defendant who had no idea what to expect when he came to court. When faced with defendant's attorney's argument that defendant had insufficient notice of the charges against him, the trial court remarked, "there's no way you don't know what he's charged with." We agree. See Boggs v. Commonwealth, 229 Va. 501, 519, 331 S.E.2d 407, 420 (1985).

*399 B. Ruling Forbidding Reference in Opening Statement to the Specific Indictments

[4] Buchanan argues that he was prejudiced in defending himself because the trial court would not allow him to describe to the jury the specifics of the several indictments against him. Because Buchanan faced eleven indictments, [FN1] and because the trial court recognized the possibility that it might not instruct the jury on each indictment, the trial court directed that in opening statements counsel were to say no more than that Buchanan had been charged with capital murder for the killing of more than one person as part of the same act or transaction. Buchanan submits that because he could not discuss the details of the several indictments, he could not discuss what his evidence would be during trial. He submits further that because the indictments were improper and because he could not mention them, he was denied the opportunity to prepare an awould risk greater prejudice by mentioning them specifically than by not mentioning them other than in general terms. Further, although the argument on brief is that Buchanan was prejudiced because he was precluded from mentioning all the indictments, in oral

argument Buchanan claimed prejudice because he faced redundant charges which were stacked up and which, because of their sheer number, left the jury with the impression that he was "bad."

We are of opinion that the trial court was fully within its authority when it instructed counsel not to make reference, in their opening statements, to the specific indictments. Such matters are within the discretion of the court. O'Dell v. Commonwealth, 234 Va. 672, 703, 364 S.E.2d 491, 509, cert. denied, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). We hold there was no abuse of discretion.

***400** III. JURY SELECTION

A. Proposed Statement To Prospective Jurors

[5] Prior to ths 8.01-358; Rule 3A:14. There is no provision in Virginia law which requires a trial court to read to prospective jurors a statement offered by a defendant. We hold that the statement was properly rejected.

B. Request For Closed Individual Voir Dire

[6] Buchanan argues that the trial court erred by refusing to permit individual voir dire outside the presence of spectators and the press. His basis for this novel proposition includes his contention that due process standards are higher in death penalty cases (citing Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)), and his reliance on a study of jurors conducted by the National Jury Project, Inc. Buchanan argues further that even if the trial court properly refused closed individual voir dire, it should have, at least, required individual voir dire.

A criminal defendant has no right to individual voir dire; the trial courts have broad discretion to decide how to conduct voir dire. Fisher v. Commonwealth, 236 Va. 403, 410, 374 S.E.2d 46, 50 (1988). It follows that there is no right to the more extreme measure of closed individual voir dire. Moreover, a decision to close a portion of a trial to the public would be fraught with problems of a constitutional nature. See Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). We hold that the trial court did not err in refusing closed individual voir dire.

Buchanan's complaint that the trial court did not conduct individual voir dire defies the record. On the first day of trial, Buchanan's motion for individual voir dire was granted. All questioning on that day was done individually. On the second day of trial, the trial court asked the prospective jurors general questions ***401** in groups of fifteen. Thereafter, each counsel asked his voir dire questions of individual prospective jurors. Buchanan participated in this procedure and did not object to it. He will not now be heard to complain. Rule 5:25.

C. Restrictions On Questions Asked by Defense Counsel

[7] During voir dire, the trial court would not allow Buchanan to ask the following two questions: (1) From what you have read or heard about this case in the newspapers, what impression do you have about this case? (2) Do you believe that a death sentence is the only appropriate punishment for capital murder? Buchanan argues that because he could not ask these two questions, he was prejudiced in his efforts to discover any bias among the prospective jurors. We disagree.

Trial courts must afford a party a "full and fair" opportunity to ascertain whether prospective jurors "stand indifferent in the cause." LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984). However, it is within the trial court's sound discretion to decide when a defendant has had such an opportunity. Id., 304 S.E.2d at 653. Further, trial courts are not required to allow counsel to ask questions which are so ambiguous as to render the answers meaningless. See id. 225 Va. at 579, 304 S.E.2d at 652-53. To be permissible, counsel's questions must be relevant in that they are such as wouldmple opportunity to counsel to ask relevant questions and where the questions actually propounded by the trial court were sufficient to preserve a defendant's right to trial by a fair and impartial jury, we will generally not reverse a trial court's decision to limit or disallow certain questions from defense counsel. See LeVasseur, 225 Va. at 582, 304 S.E.2d at 653; Mackall v. Commonwealth, 236 Va. 240, 251, 372 ****765** S.E.2d 759, 766 (1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

***402** To ask a prospective juror his impression of a case may, through a circuitous route, lead finally to a disclosure of opinion or prejudice. But, as noted above, to be relevant, a question to a prospective juror must necessarily disclose or clearly lead to the disclosure of opinion or prejudice. We do not think the first question is of that kind. It is ambiguous and unfocused. It does not, for example, ask whether, based on news coverage, the prospective juroson v. Commonwealth, 222 Va. 653, 659 n.*, 283 S.E.2d 212, 216 n.* (1981), we upheld the trial court's rejection of the following question: "Do you believe that the death penalty is ordinarily the proper punishment for the crime of capital murder?" The specific question Buchanan sought to ask was, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" The question proposed in Wm. Patterson and the one proposed here are virtually the same. Buchanan's question was properly rejected. [FN2]

FN2. We note further that the issues of jury bias and of attitudes towards the death penalty were fully and fairly explored by the trial court and counsel during voir dire. Jury selection took two days and covered more than 577 pages in the appendix. Buchanan complains that the trial court's questioning was of little use in selecting a jury because the trial court's questions were "close-ended" and "leading," while the questions Buchanan proposed were "open-ended"such conduct by a trial court constitutes reversible error. Even if Buchanan is correct about the legal proposition which he asserts, a question which we do not decide, his charges are baseless as a matter of fact.

Buchanan's first specific complaint is that the trial court criticized his counsel during the voir dire of prospective juror Baker. But this complaint is not properly before the Court. After questioning Baker, Buchanan's counsel stated, "We'll leave him, Judge. Mr. Buchanan has agreed to that." Rule 5:25.

Buchanan complains that when prospective juror Rucker stated to the court that he could not enter the jury box with an open mind and without regard to knowledge he had acquired, the trial court excused him. According to Buchanan, the trial court did not give him the opportunity to question Rucker. Quite apart from the obvious proposition that Buchanan could not be prejudiced by the trial court's striking a prospective juror who was biased against him, Bucms were struck for cause without his having a chance to question them. Just as Buchanan made no attempt to question Weigland and Thomas, the same is true for the three other jurors: Warrick, Renalds, and Taylor. Rule 5:25.

***404** Buchanan also challenges the trial court's seating of prospective jurors Garrett and Barton. However, Buchanan expressly accepted both jurors. Rule 5:25.

Buchanan argues that the trial court improperly questioned prospective jurors Hedrick, Merryman, Hartberger, and Jedelsky. However, each of these prospective jurors was struck for cause. Further, because the voir dire of each potential juror was individual, no prospective juror

heard the questioning of any other. Buchanan was not, and could not have been, prejudiced by the trial court's actions.

Buchanan next argues that the trial court showed partiality in its treatment of prospective juror Giles. Buchanan submits that because Giles indicated reservations about the death penalty, the trial court gave the Commonwealth's Attorney a chance to cross-examine her "in an effort to have the juror stricken for cause." However, the trial court seated this juror despite the Commonwealth's Attorney's motion to strike her for cause. There was nothing improper about the trial court's treatment of juror Giles.

Buchanan argues that he was prejudiced by the trial court's actions and comments during the voir dire of prospective juror Fitzgerald. He contends that the trial court interrupted his questioning and described one question as "sneaky." The trial court's statement was made after Fitzgerald had left the courtroom and no other prospective jurors were present. There was no prejudice to Buchanan from this comment.

Buchanan further complains that the trial court would not permit him to ask Fitzgerald: "Do you believe that the death sentence is the only appropriate sentence for capital murder?" We have ruled previously in this opinion that the trial court properly excluded that question. Further, the manner in which the court interrupted the questioning was not abrupt, abrasive, discourteous, rude, or indicative of bias. The trial court simply said: "Well, see that's not a proper question because he's not presumed to know what the law is...."

The trial court also would not allow Buchanan to ask Fitzgerald "Do you believe that there are any circumstances in a capital case that would warrant life imprisonment rather than the death penalty?" The trial court excluded the question on the grounds that it was hypothetical and that the trial court already had asked the same question more than three times. Again, we find nothing abrupt, abrasive, discourteous, rude, or indicative of bias in the manner ***405** of the questioning. [FN4] We find no bias in the trial court's handling of Fitzgerald's questioning.

FN4. The question itself, thoupartial jury. He states further that "[t]his summary of the voir dire procedure demonstrates that the court abused its discretion in the conduct of voir dire." We think it proves just the opposite. ****767** The trial court conducted proper voir dire, which has been subject to unfounded attack by Buchanan in this appeal. We hold that the trial court did not display bias or partiality towards the Commonwealth.

E. Motion For Additional Peremptory Strikes

[9] Buchanan moved for additional peremptory strikes. The trial court rejected his motion. Buchanan argues, in essence, that because this is a capital murder case, he was entitled to additional strikes. He contends that if he had had such further strikes he would have used them to strike prospective juror Baker.

The request was properly denied. There is no basis in Virginia law for additional peremptory strikes. Code s 19.2-262. See O'Dell, 234 Va. at 690, 364 S.E.2d at 501 (1988).

, under these circumstances, the failure to change venue denied him an impartial jury.

Buchanan argues further that the trial court utilized an erroneous legal test in deciding the motion to change venue. According to Buchanan, the trial court ruled that the only way to overcome the presumption that a defendant can receive a fair trial in his venue is to be unsuccessful in an attempt to seat a jury. Buchanan submits that the correct test is whether, under the totality of the circumstances, a defendant will receive an impartial jury.

We turn first to the question whether the trial court was correct in attempting to seat a jury before he ruled on the motion to change venue. Although Buchanan now complains of the trial court's approach, at trial he agreed to it; his counsel stated as follows: I think [the Commonwealth's Attorney] is right in his assessment that under Virginia law we have to try to seat a jury, but this motion has to be made at this time so that we have on record that we think it's going to be difficult to seat a jury in this case. In addition, the trial court's approach to resolving the venue question was fully in accord with established Virginia law.

Venue decisions are entrusted to the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion. Mackall, 236 Va. at 250, 372 S.E.2d at 765; Gray v. Commonwealth, 233 Va. 313, 333, 356 S.E.2d 157, 168, cert. denied, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); Boggs, 229 Va. at 513, 331 S.E.2d at 417. Further, a criminal defendant who challenges venue confronts a presumption that he can receive a fair trial from a jury of the vicinage. Mackall, 236 Va. at 250, 372 S.E.2d at 766; Boggs, 229 Va. at 513, 331 S.E.2d at 417. To overcome this presumption, a defendant has the burden of "establishing clearly such a pervasive prejudice among the citizens of the venue of the crime as to make it reasonably certain that he will not receive a fair trial." Mackall, 236 Va. at 250, 372 S.E.2d at 766; Stockton v. Commonwealth, 227 Va. 124, 137, 314 S.E.2d 371, 379-80, cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). See Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975).

Jurors are not required to be totally ignorant of the facts and issues in a case. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). ***407** Consequently, the mere showing of extensive publicity or general knowledge of a crime or of the accused, including his criminal record, is not enough to justify a change of venue. See Mackall, 236 Va. at 250, 372 ****768** S.E.2d at 766; see also Boggs, 229 Va. at 513, 331 S.E.2d at 417; Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977).

In deciding whether a change in venue is warranted, it is pertinent whether the publicity concerning the case is factually accurate, temperate, and noninflammatory. See Washington v. Commonwealth, 228 Va. 535, 544, 323 S.E.2d 577, 583 (1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); see also Mackall, 236 Va. at 250, 372 S.E.2d at 766; Gray, 233 Va. at 333, 356 S.E.2d at 168. Also pertinent is the rel 99 L.Ed.2d 716 (1988); Washington, 228 Va. at 544-45, 323 S.E.2d at 583. This is so because the relative ease of seating an impartial jury negates the existence of the "widespread prejudice" which a criminal defendant must show to justify a change in venue. Pope, 234 Va. at 120, 360 S.E.2d at 356.

Here, in his motion to change venue, Buchanan complained of a large amount of publicity but not that the publicity was false. The trial court considered the various news articles submitted by Buchanan and ruled that "[t]hey were just factual articles telling what actually had happened."

Buchanan also complained that eight of the twelve jurors came from one particular part of the county. The trial court ruled that the master jury list had been randomly drawn, that the jury selection process involved questioning thirty-six prospective jurors to select a panel of twenty, and that there was nothing unusual about the selection process or the fact that those ultimately chosen to sed essentially on Stockton v. Commonwealth, 852 F.2d 740 (4th Cir.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). However, in that case, which was on federal habeas review of this Court's decision in Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984), the Fourth Circuit noted specifically that its grant of habeas relief to Stockton was not based on any abuse of discretion in denying sequestration: "We do not hold that the trial court abused its discretion in refusing to ... sequester the jury." Stockton, 852 F.2d at 746.

The question whether to sequester the jury is entrusted to the sound discretion of the trial court and the trial court's decision in that regard will not be disturbed absent a showing of an abuse of discretion. See e.g., Pope, 234 Va. at 121, 360 S.E.2d at 357; Gray, 233 Va. at 340, 356 S.E.2d at 172; Jones v. Commonwealth, 228 Va. 427, 442-43, 323 S.E.2d 554, 562 (1984), cert. denied, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985). The trial court did not abuse its discretion. At the end of each day of trial, the court admonished the jury not to read the newspapers, watch television, or discuss the case with anyone. Buchanan now complains that when trial convened each morning, the trial court did not ask whether the jurors had abided by its instructions. Buchanan neither requested such questioning at trial nor objected to the lack of it. Rule 5:25. Unless it is shown otherwise, we will presume that jurors follow the trial court's instructions to avoid exposure. See Jones, 228 Va. at 443, 323 S.E.2d at 562; Waye v. Commonwealth, 219 Va. 683, 701, 251 S.E.2d 202, 213, cert. denied, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

**769 We hold that the trial court did not err in denying the motion to sequester the jury.

## V. INSTRUCTIONS ON LESSER OFFENSES

[13] Buchanan contends he was entitled to a second degree murder instruction with regard to each of the murders. With regard to his father's murder, Buchanan contends there was evidence that he shot his father only after he became angry about disparaging remarks his father had made concerning Buchanan's deceased natural mother. In oral argument, Buchanan's counsel explained that his claim of the appropriateness of a second degree murder instruction was based on the fact that defendant said he got "mad." *409 Buchanan submits that, in light of his testimony, the jury could have believed that he "acted in the heat of passion and killed his father out of anger rather than as a result of premeditation."

With regard to the murder of his brothers and his step-mother, Buchanan does not rely upon any facts as the basis for his claim of a right to second degree murder instructions. Instead, he relies on Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969), for the general proposition that all homicide is presumed to be second degree murder. He then argues that this case is similas, therefore, that a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." Clark v. Commonwealth, 220 Va. 201, 209, 257 S.E.2d 784, 789 (1979), cert. denied, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

A second degree murder instruction is only appropriate where it is supported by evidence. Justus v. Commonwealth, 222 Va. 667, 678, 283 S.E.2d 905, 911 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982); Painter, 210 Va. at 367, 171 S.E.2d at 171. Moreover, the evidence asserted in support of such an instruction "must amount to more than a scintilla." Justus, 222 Va. at 678, 283 S.E.2d at 911; Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978).

The foregoing legal principles leave no doubt that Buchanan was not entitled to second degree murder instructions with regard to the murders of Mrs. Buchanan, J.J., and Donnie. Buchanan's claim for such instructions with re Each time he admitted that his wife knew what he was going to do before he did it. In his first confession and at trial, he admitted that he and his wife drove to the Buchanan house on September 14, the night before the murders, in order to kill his family, but that he could not commit the murders at that time. In each version of the events of September 15, Buchanan admitted walking to his father's house carrying a loaded .22-caliber rifle. In his second confession, he admitted that he wore rubber gloves when he committed the murders.

Buchanan's descriptions of what transpired just prior to his father's murder were as follows: In his first confession, he **770 stated that he and his father were inside the house talking but his father did not ask how Buchanan and his wife were doing. Buchanan said this omission "was really making [him] mad." He stated that he and his father started arguing but he immediately explained without any prodding from the examiners that: "I mean it wasn't--I mean it wasn't a heated argument." Buchanan continued: "All right--then he started to walk out the door and I shot him." Buchanan's interviewer asked him to explain exactly what happened. Buchanan replied, "[h]e turned around instead of walking out the door and I shot him from behind." Asked what happened next, Buchanan answered: "And then he fell to the ground and I shot him again."

Buchanan was then asked specifically whether he and his father were arguing at the time Buchanan, Sr. was killed; Buchanan said no: "See we weren't arguing at the time. What he was doing was gonna show me his blue Nova [automobile], cause I hadn't seen it before." The interviewer asked what lead up to the murders; Buchanan replied: "They never treated me like a son--they treated me like an outsider all the time. I mean--I don't think they cared." Again Buchanan was asked whether it was any particular thing that "set it off at this particular time." He replied: "there was no one thing that they could of done that--would have done that, it's just that I mean, they never talked to me when I was living there."

In his second confession, Buchanan stated that he and his father were inside the house talking "and started arguing--not really arguing but just, you know, just disagreeing, mostly. And just *411 hassling--it's been going on between us and things like that. Then uh he wanted to talk and showed me the-- the newest Nova that he had." Buchanan stated further that: "And uh and then I shot him then--before he went out the door." When asked where he shot his father, Buchanan replied: "From the back--in the back of the head." Then Buchanan shot his father again, this time in the face.

At trial, on direct examination, Buchanan said that he and his father were inside the house talking when his father said that Mrs. Buchanan was cheating on him. Buchanan suggested that his fatheBuchanan tried to defend his natural mother, his father broke off the conversation saying "that's it, let's go out and look at this car I bought for J.J." These questions and answers followed: Q. And then what happened? A. Then he started to walk out the door and I shot him. Q. Why did you do it? A. I don't know. I was just mad. I just was--I don't know really why I did it. I didn't mean to. It just happened. Q. Well, what happened after you shot him? A. I just kind of stared at him for a minute--I don't know--I didn't know--I was scared--I didn't know what to do. And then I shot him again.

On cross-examination, Buchanan testified that the argument with his father had not been heated: "It wasn't really heated. It's just that he yelled at me a couple of times." "It was no stand up arguing or pushing or anything like that." "[W]e were both getting mad, but we were not pushing or fighting." Buchanan also admitted that his father tried to call off the disagreement by suggesting **4to walk out the door when Buchanan--having time to think and, by his own admission, intending to kill--shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). See Barnes v. Commonwealth, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); Bradshaw v. Commonwealth, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell, Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction;

**this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation. We hold that the trial court did not err in denying Buchanan's request for a second degree murder instruction concerning his father's murder.**

## VI. CONSTITUTIONAL CHALLENGE TO THE STATUTORY SCHEME

### A

**[14] Buchanan contends that the Virginia death penalty statute is unconstitutional because it commits the sentencing decision to the unbridled discretion of a judge or a jury. This challenge to the Virginia statute is not new and has previously been considered and rejected. See, e.g., Hoke v. Commonwealth, 237 Va. 303, 305, 377 S.E.2d 595, 597, cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989); Pope, 234 Va. at 121-22, 360 S.E.2d at 357; Gray, 233 *413** Va. at 320, 356 S.E.2d at 160; Stockton, 227 Va. at 134-35, 314 S.E.2d at 378. We adhere to our previous rulings.

### B

[15] Buchanan also contends that Code s 18.2-31(g), the provision under which he was convicted of capital murder, was unconstitutional. The statutory provision read as follows: "The following offenses shall constitute capital murder ... (g) The willful, deliberate and premeditated killing of more than one person as part of the same act or transaction...." Buchanan contends that the term "transaction" is inherently ambiguous. He submits that the term "encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances, for which one can receive the death penalty."

We considered and rejected this precise argument in Woodfin v. Commonwealth, 236 Va. 89, 372 S.E.2d 377 (1988). There, we explained that a "penal statute is void for vagueness if it fails to give a person of ordinary intelligence notice that his contemplated conduct is forbidden by the statute and if the enactment encourages selective law enforcement." Id. at 92, 372 S.E.2d at 379. In Woodfin, we said there was nothing uncertain or ambiguous about the phrase "same act or transaction" when it was applied to the criminal defendant's actions in that case. We held that two offenses arise out of the "same act or transaction" if they are so closely connectedt which is qualitatively different from conduct in a non-capital murder." We have already considered and rejected this argument. Turner v. Commonwealth, 234 Va. ***414** 543, 552, 364 S.E.2d 483, 488, cert. denied, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). We adhere to our previous rulings. [FN5]

FN5. Included within this constitutional attack on the vileness test is an argument, advanced for the first time on this appeal, that the trial court should have ruled, as a matter of law, that the killings of Buchanan, Sr. and Donnie were not vile. Rule 5:25.

## VII. CHALLENGES TO THE GUILT PHASE VERDICT

### A. Discrepancy Between The Indictment and the Jury's Verdict

[17] Buchanan complains that there is a discrepancy between the indictments and the jury's verdicts because the jury found him guilty of the capital murder of each of the victims instead of finding him guilty of only one capital murder. Buchanan did not object to the jury's verdict on this basis. [FN6] Thus, we will not consider this issue. Rule 5:25.

FN6sed on the evidence in this case and the law, that the jury should not have found that all four killings were part of the same transaction."

### B. Double Jeopardy Violation

[18] Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free of multiple punishments for the same offense. He argues that since he killed four people and was tried and convicted of four first degree murders, his additional conviction of capital murder subjected him to multiple punishments for the same offense because first degree murder is a lesser included offense of capital murder. And, he argues, a conviction of a lesser included offense constitutes acquittal of all higher offenses. In oral argument, Buchanan approached the issue from the other direction; he submitted that because the jury returned a verdict of four capital murder convictions, the jury could not convict him of four first degree murders. On brief, Buchanan argues that because the capital murder convictions and the first degree murder convictions were based on the same facts, the first degree murder convictions should stand and the capital murder convictions should be dismissed.

The Commonwealth argues that two basic principles refute Buchanan's concern about a Fifth Amendment multiple punishment ***415** violation. The first principle is that where a defendant is convicted of more than is charged in the indictment, the excess convictions must be set aside and the related sentences vacated. See Morris v. Commonwealth, 228 Va. 206, 209, 321 S.E.2d 633, 634- 35 (1984). The second principle is that where, in a single trial, a defendant is convicted of a lesser included offense and the greater offense, the proper remedy is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction and sentence on the greater offense. Brown v. Commonwealth, 222 Va. 111, 116, 279 S.E.2d 142, 145 (1981). See United States v. Buckley, 586 F.2d 498, 505 (5th Cir.1978), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1979). We agree with the Commonwealth.

The only indictment on which the jury was instructed was the first indictment wherein Buchanan was charged with killing Buchanan, Sr. as part of the same act or transaction in which he killed J.J., Donnie, or Mrs. Buchanan. Under this indictment, the jury could convict Buchanan of only one capital murder, but the indictment gave the jury seven choices as to which victims were killed as part of the same act or transaction. The jury found that Buchanan killed all four victims as part of the same act or transaction. However, the jury then went on to find Buchanan guilty ****773** of the capital murders of each of the four victims. This second part of the verdict was, under the indictment on which the jury was instructed, beyond the jury's power. Given the way the indictment was framed, the only capital murder which the jury could find was that of Buchanan, Sr. Unde, as the Commonwealth concedes, incorrect. The problem, as the Commonwealth describes it, is one too many first degree murder convictions.

The remedy is uncomplicated. Under the rule in Brown, Buchanan's first degree murder conviction for killing his father must be vacated along with the related sentence. [FN7]

FN7. The trial court's view that Fitzgerald v. Commonwealth, 223 Va. 615, 637, 292 S.E.2d 798, 810-11 (1982), supports the five convictions is incorrect. In Fitzgerald, a capital murder-robbery case, we held that the defendant could be convicted of capital murder for the killing and also be convicted separately of the robbery. In order for Fitzgerald to support the five convictions which occurred in the instant appeal, we would have had to rule that Fitzgerald could have been convicted of capital murder, first degree murder, and robbery.

## *416 VIII. MISCELLANEOUS

### A

Buchanan claims the trial cour out-of- court interviews and discussions they had had in arriving at their expert opinion concerning Buchanan's state of mind at the time of the murders and the need for further neurological testing. Buchanan urges us to apply the expert testimony rule that applies in civil cases, Code s 8.01-401.1.

The trial court excluded testimony of the hearsay information on the ground that experts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial. The trial court was plainly correct. We decided the issue in Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984). We adhere to our previous ruling.

### C

[21] Buchanan submits that it was error to list the statutory aggravating factors for the jury while refusing to list the mitigating factors mentioned in the statute. Even in advancing this argument, Buchanan admits that it is contrary to Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986). Yet he asks us to reconsider Watkins. We decline the invitation. The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the *417 defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. Watkins, 229 Va. at 491, 331 S.E.2d at 438; Clark, 220 Va. at 212, 257 S.E.2d at 790.

### D

Buchanan argues that the trial court erred by refusing to advise the jury regarding **774 consecutive sentences and the possibility of parole. There was no error in this ruling. We have held that a jury must impose the sentence it deems appropriate without regard to what will happen later. See Poyner v. Commonwealth, 229 Va. 401, 418-19, 329 S.E.2d 815, 828, cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 and 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985).

### E

Buchanan argues here for the first time that penalty phase instruction 1-P should not have been granted. Yet, at trial, defense counsel said there was "no objection" to the instruction. Rule 5:25.

### F

[22] Buchanan submits that the trial court erred in refusing to allow him to secure additional neurological testing in an effort to develop evidence in mitigation. Buchanan sought to establish that his brain had suffered temporal lobe damage.

Prior to trial, Buchanan was examined at the University of Virginia. Those examinations included a complete neurological examination, an E.E.G., and an M.R.I. (magnetic resonance imaging). All tests were negative. When he was examined at the University of Virginia, the doctors there were looking for, but did not find, the same type brain damage that Buchanan hoped to find with a new series of tests. At a hearing on the motion, the evidence showed that even if temporal lobe damage is found, the authorities anwealth, 232 Va. 521, 528, 352 S.E.2d 342, 346, cert. denied, 483 *418 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). In our opinion, the trial court did not abuse its discretion in denying the motion.

## IX. STATUTORY REVIEW

[23] Our independent review of the record reveals nothing to suggest that the death penalty was imposed in this case as the result of passion, prejudice, or arbitrariness. The evidence of guilt was fully sufficient. This same evidence was relied upon in the penalty phase and was ample to support the death penalty. We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice.

Defendant does not argue, and we find no evidence, that this death sentence was excessive or disproportionate. We have accumulated death penalty cases involving Code s 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that jurio. 890107--Affirmed.

Record No. 890108--Modified and Affirmed.

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CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA
FILED
JAN 25 1996
MORGAN E. SCOTT, JR., Clerk
By: Deputy Clerk
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

| | | |
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| DOUGLAS MCARTHUR BUCHANAN, | ) | |
| | ) | |
| Petitioner, | ) | Civil Action No. 93-0306-R |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| EDWARD W. MURRAY, DIRECTOR, | ) | |
| VIRGINIA DEP'T OF | ) | |
| CORRECTIONS AND THE | ) | |
| COMMONWEALTH OF VIRGINIA, | ) | By: Hon. James C. Turk |
| | ) | United States District Judge |
| Respondents. | ) | |

In accordance with the written memorandum opinion entered this day, it is hereby

ADJUDGED AND ORDERED

(1) that respondent's motion to dismiss the above referenced petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, shall be and hereby is **GRANTED**;

(2) that the petition for *habeas* relief shall be and hereby is **DENIED**;

(3) that petitioner's motion for discovery shall be and hereby is **DENIED**; and

(4) that this action is stricken from the active docket of this court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 25th day of January, 1996.

James C. Turk
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
E. L. Weeks
DEPUTY CLERK

**APPENDIX**
**B**

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA
FILED
JAN 25 1996
MORGAN E. SCOTT, JR., Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

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| DOUGLAS McARTHUR BUCHANAN, | ) | |
| | ) | |
| Petitioner, | ) | Civil Action No. 93-0306-R |
| | ) | |
| v. | ) | MEMORANDUM OPINION |
| | ) | |
| EDWARD W. MURRAY, DIRECTOR, | ) | |
| VIRGINIA DEPT. OF | ) | |
| CORRECTIONS, AND THE | ) | |
| COMMONWEALTH OF VIRGINIA, | ) | By: Hon. James C. Turk |
| | ) | United States District Judge |
| Respondents. | ) | |

DOUGLAS McARTHUR BUCHANAN brings this action as a petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254. He states that he is confined by respondents under a sentence of death at the Mecklenburg Correctional Center, located in Boydton, Virginia. He claims that his confinement is in violation of the Constitution of the United States for the reasons set forth herein. Respondent has filed a motion to dismiss the §2254 petition as meritless, to which petitioner submitted a memorandum in opposition. Respondent then submitted a reply to petitioner's memorandum, to which petitioner again filed a memorandum in opposition. The court has also received the complete trial, appellate and post-conviction record of petitioner's case. After review of the record and the pleadings submitted by the parties, the court finds no material issues of fact to be in dispute and, thus, determines that no evidentiary hearing is necessary to evaluate the merits of petitioner's *habeas* claims. Furthermore, in accordance with the following, it is the opinion of the court that the motion to dismiss must be granted and that the petition for *habeas corpus* must be denied.

## I. FACTS

Petitioner Douglas McArthur Buchanan, Jr., was convicted by a jury in the Circuit Court for Amherst County, Virginia, for killing his father, Douglas Buchanan, Sr.; his stepmother, Geraldine Buchanan; and his two stepbrothers, Donnie and J.J. Buchanan on September 15, 1987. Buchanan was nineteen years old at the time of the killings. Although he confessed to performing the killings, he asserts that his wife, Christianne, two years his senior, was the driving force behind the murders. She has also confessed to her participation in planning and preparing for the killings.

Family history seems to have played some part in the killings. Buchanan's natural mother died after a long illness when he was nine. Six months later, his father married Geraldine, a first cousin of Mrs. Buchanan. When he was a young child and then while his mother was sick, Buchanan often stayed with her parents and other relatives on her side of the family. About a year after his mother's death, however, some sort of family feud arose between his parents (his father and Geraldine) and his natural mother's relatives. Buchanan was punished if he waved or talked to them, even though they lived close by. Geraldine removed or burned all the pictures of his mother that she could find, saying she wanted to be his only mother. His parents also forbade him from visiting his mother's grave. He had other disagreements with his parents over chores and extracurricular activities. He ran away on several occasions and joined the National Guard before finishing high school.

On December 8, 1986, Buchanan married Christianne secretly. After his parents discovered the marriage, the couple lived in Buchanan's bedroom in his parents' home for several months. Later, his parents helped the young couple get their own housing. In June,



1987, Buchanan had an emergency appendectomy. While he was in the hospital, Christianne invited his mother's relatives to visit him, angering Buchanan's father and Geraldine. Buchanan testified that he and Christianne did not speak to his parents from June until September.

On September 14, 1987, Buchanan and Christianne talked about killing his parents.[1] The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left. The next day, September 15, Buchanan missed work. He and Christianne drove to the Blue Ridge Parkway and had a picnic at a spot within several minutes walk of the Buchanan home. Sometime around 3:00 in the afternoon, Buchanan walked from the picnic spot to his father's house. He carried a .22 caliber rifle and a pair of rubber gloves. He found his father in the yard and told him that he had been squirrel hunting. They went inside and talked for awhile without incident, but then the conversation turned to an old disagreement over the supposed infidelity of Buchanan's natural mother. The discussion angered them both, and there was considerable yelling. Even so, Buchanan told police that it was not a heated argument.

The father changed the subject and asked Buchanan to come outside to see a car he had recently purchased for J.J., Buchanan's thirteen-year-old stepbrother.[2] As his father walked toward the door, Buchanan shot him in the back of the head. The father fell. Buchanan then

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[1]According to Buchanan's testimony, Chris told him that the only way to solve his family problems was to kill the family. Buchanan asserts that Christianne was highly unstable and that she resented Geraldine, perceiving her as competition for his affection. She was dismissed from the Air Force on psychiatric grounds shortly after she and Buchanan married.

[2]Buchanan testified that this remark angered and hurt him because he had not been allowed to get a driver's license until he was eighteen, and he had never been given a car.

placed the nose of the rifle against his father's forehead and fired again. Buchanan dragged the body to the master bedroom and put a towel over the face. He got a .22 caliber pistol from under a mattress and took it with him back to the living room.[3]

About fifteen minutes later, Buchanan heard Donnie and J.J. arriving home from school. Holding the rifle, he hid behind the door. As Donnie, age ten, walked in the door past Buchanan, Buchanan shot him in the back of the head[4] and then in the face near his right temple. J.J. heard the shots and ran back out into the yard where Buchanan shot and wounded him in the back. Buchanan promised to call for help and coaxed J.J. to come back into the house where Buchanan shot him a second time, in the head. Buchanan pulled the boys' bodies out of the living room, but J.J. was still alive. He got up and walked back into the living room. Buchanan got a knife from the kitchen and stabbed the boy numerous times in the head, back and neck, severing his carotid artery.

Buchanan testified that he had blamed Geraldine, his stepmother, for all the family problems, since they started with her marriage to his father. He stated that on September 15, he went to the house intending to talk to her, expecting that she would be home alone.[5] After killing his father and the boys and moving their bodies, Buchanan testified, he grew very angry at Geraldine and determined to kill her also. He spread a blanket over the bloodstains in

[3]Buchanan testified at trial that he thought about killing himself at this point and that he was about to leave the house when his stepbrothers came home.

[4]Buchanan testified that he did not intend to shoot, that the rifle just went off. He said that he had never planned to kill the boys, but testified that "it just happened" and that he went "crazy" after killing his father.

[5]He testified that he took the gun to the house for protection, as Geraldine had once drawn a gun to break up a fight between Buchanan and his father. He remembered that Geraldine usually tried to be home by 3:00 in the afternoon on weekdays, before the boys got home from school, but she had recently started a new session of classes at Sweetbriar College and was working part time.



the living room and waited for her to come home. When he heard her arrive, he hid behind the door. As she stood in the living room, he fired at her, but the gun did not function. He fired again, and the bullet grazed her head. She fell to her knees. Buchanan stabbed her repeatedly with the kitchen knife in the neck, skull and chest. Her neck was severed to the spine, and she had knife wounds in her hands as though she had tried to defend herself.[6]

Taking the knife and the rifle, Buchanan fled from the house and walked through the woods back to the Parkway where Christianne was waiting in their truck. She drove and helped him dispose of his bloody tennis shoes, the knife and the rifle. Buchanan and Christianne fled to New Mexico where they were ultimately apprehended and confessed to the murders.

## II. PROCEDURAL HISTORY

On October 6, 1987, Buchanan was indicted by a Grand Jury of Amherst County, Virginia, for four capital murders and four counts of use of a firearm in the commission of a murder.[7] Three of these initial capital murder indictments were later quashed. The Grand Jury then issued two additional capital murder indictments of two counts each and separate indictments bringing four counts of first degree murder. Buchanan objected to the additional capital murder indictments as vague and redundant.[8] In February, 1988, the Circuit Court for

[6]Buchanan denies that she struggled.

[7]As now numbered, Va. Code Ann. §18.2-31(7), the Virginia death penalty statute, provides that a person may be charged with capital murder for "[t]he willful, deliberate, and premeditated killing of more than one person as part of the same transaction."

[8]The specific posture of the indictments in Buchanan's case will be discussed in greater detail, infra, in conjunction with the court's analysis of his claims involving the indictments.

Amherst County denied Buchanan's motion for a change of venue. In April, the court denied petitioner's motions for additional peremptory challenges, his motion to sequester the jury, and his renewed motion for change of venue. On April 25, 1988, Buchanan pled not guilty to all charges.

The Amherst Circuit Court conducted a jury trial April 26-28, 1988. The jury convicted Buchanan of at least one charge of capital murder, four counts of first degree murder, and four counts of use of a firearm in the commission of a murder. After a separate sentencing hearing on April 29 and 30, 1988, the jury sentenced Buchanan to death on the capital murder conviction, to life imprisonment on each of the four first degree murder charges, to two years on one of the firearms charges, and to four years on each of the three remaining firearms charges. On August 19, 1988, after reviewing the state probation officer's post-sentence report and denying petitioner's requests for additional neurological testing, the court overruled petitioner's motion to set aside the verdict of the jury and imposed the jury's recommended sentences.

On September 22, 1989, the Supreme Court of Virginia set aside the first degree murder conviction for the killing of Buchanan's father, and affirmed the capital murder conviction, the remaining three first degree murder convictions, and the firearms convictions. Buchanan v. Commonwealth, 384 S.E.2d 757 (Va. 1989), cert. denied, 493 U.S. 1063 (1990) [hereinafter Buchanan]. By order dated January 22, 1990, the United States Supreme Court denied a petition for writ of certiorari. Buchanan v. Virginia, 493 U.S. 1063 (1990).

In June, 1990, Buchanan filed a petition for writ of *habeas corpus* in the Circuit Court of Amherst County, Virginia; he subsequently amended the petition in September, 1990. The



Circuit Court, by order dated August 15, 1991, dismissed all of petitioner's claims except one allegation of ineffective assistance of counsel. On September 24, 1990, the Circuit Court conducted an evidentiary hearing on this sole remaining allegation, but issued a final order dismissing all of Buchanan's *habeas* claims on December 19, 1991. Buchanan filed a petition for appeal of this dismissal to the Virginia Supreme Court. By unpublished order dated June 25, 1992, the Virginia Supreme Court denied the petition. Buchanan then filed a timely petition for writ of certiorari to the United States Supreme Court which was denied. Buchanan v. Murray, 113 S.Ct. 501 (1992).

## III. PETITIONER'S CLAIMS

I. During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

II. The penalty phase instructions to the jury were constitutionally deficient because they failed to instruct the jury surficiently as to mitigation and as to the aggravating circumstance of "vileness."

   A. The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

   B. The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

   C. The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

   D. The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

III. Virginia's capital punishment statute, as interpreted by the Virginia Supreme Court, and as applied in this case, is unconstitutional.

A. Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

B. Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

C. Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

D. Virginia does not provide meaningful appellate review and did not in Buchanan's case.

E. Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

IV. The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

V. During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

VI. Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

VII. Buchanan was denied due process, assistance of counsel and the right to present evidence by the vague and inappropriate framing of the indictments.

A. Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

B. The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

VIII. The trial court unconstitutionally denied Buchanan's motion for change of venue.

A. Pretrial publicity about the crimes and the trial of Buchanan's wife so tainted the local jury pool that a change of venue should have been granted.



B. Pretrial publicity which included wholly false accounts that the killings were committed for financial gain so tainted the local jury pool that a change of venue should have been granted.

IX. The trial court committed constitutional errors during jury *voir dire*.

A. The trial court refused to let defense counsel ask about jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

B. The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

C. The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them.

X. The trial court made constitutional errors regarding selection and sequestration of the jury.

A. The trial court failed to sequester the jury.

B. The trial court failed to grant additional peremptory challenges during jury selection.

XI. Imposition of the death penalty constitutes cruel and unusual punishment.

XII. Buchanan was denied effective assistance of counsel.

A. Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.

B. Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

C. Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

D. Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

E. Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

F. Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

G. Counsel made evidentiary errors.

1. Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

2. Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

H. Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

XIII. Other constitutional violations:

A. The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

B. The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

C. The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

D. Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.



E. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

## IV. OPINION OF THE COURT

### A. Exhaustion and Procedural Bar

In reviewing the record, the court finds several of Buchanan's claims to be barred from federal *habeas* review under the doctrines of exhaustion and procedural default. A federal court may not grant a petition for writ of *habeas corpus*, pursuant to §2254, unless petitioner has exhausted the remedies available in the courts of the state which convicted him. §2254(b). To exhaust his state court remedies, a death penalty defendant in Virginia must present his claims to the Virginia Supreme Court, through one of the following methods. First, he appeals the conviction and sentence directly to the Virginia Supreme Court. Va. Code Ann. §17-116.05:1(B). Second, he can file a state *habeas* petition with the circuit court where he was convicted, with appeal of an adverse decision to the Virginia Supreme Court. Va. Code Ann. §8.01-654; §17-116.05:1(B). Finally, he can exhaust his remedies by filing a state *habeas* petition directly with the Virginia Supreme Court. Va. Code Ann. § 17-97. Buchanan has exhausted his state court remedies as to most of his claims by presenting them to the Virginia Supreme Court, either on direct appeal or in his state *habeas* petition and appeal therefrom or both.

Federal review of fully exhausted claims may be barred because petitioner has defaulted some state procedural rule. Where petitioner has failed to comply with a state procedural rule and the state supreme court has expressly relied on that procedural default as an adequate and independent state law ground for denying relief on a claim, federal review of

that claim is normally barred. See Harris v. Reed, 489 U.S. 255, 262 (1989) and Wainwright v. Sykes, 433 U.S. 72, 87 (1977). A federal court may review defaulted claims only if petitioner excuses his default through a showing of cause for the default and resulting prejudice or a showing of actual innocence. Harris, 489 U.S. at 262.

On direct appeal, the Virginia Supreme Court found several of Buchanan's claims barred under Virginia's contemporaneous objection rules. In its order denying Buchanan's appeal from the circuit court's denial of his state *habeas* petition, the Virginia Supreme Court found several claims, or parts of them, to be barred by the rule of Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974), cert. denied, 419 U.S. 1108 (1975).[9] Under the Slayton rule, claims which should have been raised at trial and/or on direct appeal, but were not raised at the proper time, cannot constitute grounds for state *habeas* relief. Id. Unless Buchanan can excuse his defaults of these claims, the court is barred from review of the merits even though the claims are exhausted. Harris, 489 U.S. at 262.

Ordinarily, in order to give state courts the opportunity to pass on the constitutionality of their criminal convictions and sentences, if a state *habeas* petitioner has not exhausted his available state remedies as to some of the claims raised in the federal petition, a federal court should dismiss the entire petition without prejudice to allow exhaustion of the claim before the state courts. Rose v. Lundy, 455 U.S. 509, 522 (1982). However, where a petitioner has not exhausted his state court remedies as to some claims, but has exhausted others, the federal court looks to applicable state law under which the state court would have ruled on the

[9]Analysis of exhaustion and procedural default in this case is complicated by the fact that the claims were numbered differently in state and federal proceedings, despite the fact that present counsel also represented petitioner in the state *habeas* proceedings.



unexhausted claims; if it is clear that the state's procedural law would now bar state review of the unexhausted claims, should petitioner attempt to exhaust his state court remedies, the federal court need not dismiss the petition to require complete exhaustion. Teague v. Lane, 489 U.S. 288, 297-98 (1989); Bassette v. Thompson, 915 F.2d 932, 936-37 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Nevertheless, federal review of the claim is barred, based on petitioner's default of the state procedural rules, unless petitioner demonstrates cause and prejudice or actual innocence to excuse the default. Teague, at 298; Bassette, at 937.

Part or all of certain claims in Buchanan's federal *habeas* petition have not been presented to any state court. Although these claims are not exhausted as normally required under §2254, they are based on facts which Buchanan knew or reasonably should have known at the time he filed his state *habeas* petition. Accordingly, the Virginia Supreme Court would now find all of these claims procedurally defaulted under Va. Code Ann. §8.01-654(B)(2). Under this statute, *habeas* relief cannot be granted in a later petition if petitioner knew or should reasonably have known all the facts necessary to those claims at the time he filed an earlier state petition. Id. Because the inevitable procedural default of Buchanan's unexhausted claims under §8.01-654(B)(2) serves as an adequate and independent state law ground on which the claims must be decided, this court need not dismiss the petition to allow exhaustion of these claims; nevertheless, the court is barred from review of the merits by the state procedural default, absent a valid excuse for the default. See Teague, 489 U.S. at 297-98; Bassette, 915 F.2d at 936-37. If Buchanan can demonstrate cause and prejudice for his procedural default of these claims, or show actual innocence, this court may address his unexhausted claims on the merits even though no state court has considered them.

As to several of these claims, Buchanan attempts to excuse his procedural default by arguing that ineffective assistance by his trial counsel caused the default by failing to raise the claim at trial. Ineffective assistance of counsel can constitute cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 488 (1986). However, petitioner must show that (1) the ineffective assistance itself was constitutionally significant, Strickland v. Washington, 466 U.S. 668, 687 (1984); (2) the ineffective assistance claim was presented to the state courts as required for exhaustion under §2254; and (3) the ineffective assistance claim itself has not been defaulted, Murray, at 488-89. See also Justus v. Murray, 897 F.2d 709, 713 (4th Cir. 1990). Under the principles of comity inherent in §2254, the Virginia court must have a meaningful opportunity to consider the ineffective assistance claim before this court may address it, as a substantive claim or as cause to excuse procedural default of another substantive claim.

Petitioner also argues that he should be excused from exhausting several of his claims because raising the claims to the Virginia courts was or would now be futile, as the Virginia Supreme Court had addressed similar issues in earlier cases and ruled against petitioner's position. Buchanan further asserts that if futility excused him from exhausting the claim in the first place, then procedural default is not even an issue since default occurs during the exhaustion process. It is the opinion of the court that, under controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, this argument fails.

In rare cases, exhaustion of §2254 claims before the state courts may be excused by futility. (1) If the procedural rule under which the state court has found or would find default



does not qualify as an independent and adequate state law ground upon which the claim must be decided and (2) exhaustion of the substantive claim before the state courts would be futile (because the state court has recently ruled decisively in a similar case against the legal theory supporting the claim), the federal court may reach the merits without dismissing the entire petition to require complete exhaustion, even if no state court has had opportunity to review the unexhausted claim. See Adkins v. Bordenkircher, 674 F.2d 279, 281 (4th Cir. 1982), cert. denied, 459 U.S. 853 and 459 U.S. 878 (1982). However, where a claim is clearly procedurally defaulted or would be procedurally defaulted if now raised to state courts, futility offers no excuse for petitioner's exhaustion errors. See id.; Engle v. Isaac, 456 U.S. 107, 129 (1982).

In Engle v. Isaac, the United States Supreme Court reaffirmed previous holdings that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129. Like Buchanan, Petitioner Isaac argued that he should be excused by the futility exception for failing to raise his claim properly to the state courts because state courts had already ruled decisively against similar legal arguments in an earlier case and would surely rule against his claim. The Supreme Court refused this excuse adamantly:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

Id. at 130. The court finds Engle and Bordenkircher to be consistent in holding that futility cannot excuse petitioner's failure to exhaust a *habeas* claim which is clearly procedurally defaulted, or would be procedurally defaulted if now presented to state courts, under a state procedural rule which serves as an adequate and independent state law ground for disposition of the claim.

The claims which Buchanan attempts to excuse under the futility argument were either found by the Virginia Supreme Court to be procedurally barred under Slayton, 205 S.E.2d at 682, or Supreme Court Rule 5.25, or would now be barred under §8.01-654(B)(2), as Buchanan has already filed one state *habeas* petition. These Virginia default rules have been repeatedly held to qualify as adequate and independent state law grounds disposing of claims before a court may reach the merits. See Bassette, 915 F.2d at 936; Whitley v. Bair, 802 F.2d 1487, 1501 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987); Johnson v. Muncy, 830 F.2d 508 (4th Cir 1987). Based on the foregoing, it is the opinion of the court that Buchanan cannot rely on the futility doctrine to excuse either his failure to exhaust or his procedural default of any of his claims.[10]

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[10]Buchanan cites Nix v. Whiteside, 475 U.S. 157, 163 n. 3 (1986) as an indication that the United States Supreme Court still recognizes futility as an excuse for exhaustion of *habeas* claims. Footnote 3 in Nix recognized that the United States Court of Appeals for the Eighth Circuit and the district court had both found Petitioner Whiteside's *habeas* claim to be properly exhausted "since further proceedings would be futile." However, the Eighth Circuit based its refusal to require further exhaustion of Whiteside's ineffective assistance claim on two particular findings, unique to the facts of Whiteside's case: (1) the court found that further exhaustion of the claim would be futile because the state supreme court had "already determined that the state code of professional responsibility vindicated [petitioner's] counsel's actions and had in fact commended counsel for the 'high ethical manner' in which the matter had been handled"; and (2) as the ineffective assistance claim was so closely tied, factually and analytically, to federal due process and fair trial claims which Whiteside had already presented to the state court, the court found that the substance of petitioner's ineffective assistance claim had been presented to state courts sufficiently to satisfy §2254 exhaustion requirements as defined in Anderson v. Harless, 459 U.S. 4, 6 (1982)(see additional discussion, infra). Whiteside v. Scurr, 744 F.2d 1323, 1326-27 (8th Cir. 1984). In essence, the Eighth Circuit determined, the state supreme court had already addressed both the factual and the legal aspects of the ineffective assistance claim; accordingly, the court reasoned, the claim was exhausted and not defaulted, allowing



**B. Analysis of Petitioner's Individual Claims**

**Claim I: During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.**

Petitioner argues that his right to due process was violated when the trial court excluded testimony at the sentencing phase of the trial upon the basis of hearsay. During that phase of the trial, petitioner attempted to elicit testimony from his expert witness, Dr. Robert S. Brown, Sr., as to the content of statements made to him by other individuals during the course of interviews conducted for the purpose of discovering Buchanan's mental and emotional history. Petitioner offered this testimony to provide factual support for Dr. Brown's expert opinion that the circumstances of petitioner's family history played a large role in his decision to kill certain members of his family. However, the Commonwealth objected to the admissibility of these out of court statements on hearsay grounds. The court sustained the objection but offered to allow Buchanan an opportunity to summon the declarants to testify as to their own statements. Counsel declined the offer and limited examination to questions directly addressing Dr. Brown's expert opinion.

Relying primarily on Green v. Georgia, 442 U.S. 95 (1979), petitioner maintains that the court should have permitted Dr. Brown to testify as to the statements on which he based his expert opinion. In Green, the Supreme Court held that a "mechanistic" application of state evidentiary rules at the sentencing phase of capital trial could rise to the level of a due process

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federal review of the merits. Buchanan's case does not equate with the unique posture of Whiteside's case, and the mere use of the word "futile" by the Supreme Court in Nix does not magically legitimize Buchanan's futility arguments in the face of Engle and Bordenkircher.

violation if there existed factors weighing against strict application of the rules. Id. at 97. Petitioner contends that, without the support of the interviewees' statements, Dr. Brown's opinions were robbed of any persuasive effect they might have had. Petitioner argues that, in view of this detrimental impact on Dr. Brown's expert opinion and the absence of any indicia of unreliability, the application of the hearsay rule to Dr. Brown's proffered testimony was so mechanistic as to rise to the level of a due process violation.

In response to these arguments, respondent refuses to acknowledge that the exclusion of testimony upon the basis of a state evidentiary rule could rise to the level of a due process claim. While such a position is clearly in conflict with Green v. Georgia, supra, the court must nevertheless agree that the application of the hearsay rule in this particular instance does not rise to the level of a constitutional violation. In Green, the Supreme Court dealt with a situation in which a state court had excluded testimony at the sentencing phase of a criminal trial upon the basis of hearsay, even though it had admitted this same testimony at the guilt phase of a codefendant's trial. The testimony at issue involved an out of court statement proffered to show that the defendant had not been physically present when the victim had been killed by his codefendant. Consequently, the out of court statement bore upon a precise factual issue which was highly relevant to the defendant's culpability. Moreover, the proffered statement in Green had been uttered by the codefendant under circumstances in which there was no indication of ulterior motive, thus lending the statement a great deal of reliability. 442 U.S. at 97.

Although it cannot be denied that facts relayed by individuals who personally knew a capital defendant may also be highly relevant to whether the death penalty should be imposed,



the statements in Buchanan's case were only offered to support an expert's opinion that was, in fact, presented to the jury. The statements at issue, therefore, would have born only indirectly on petitioner's character and culpability and, as such, would have been of somewhat limited probative value. Yet, there was no assurance of reliability other than petitioner's representations that the declarants had no reason to be untruthful given the purpose of Dr. Brown's interviews. Accordingly, the statements in this case were not only less probative, but also bore fewer indicia of reliability than did the statement in Green.

Furthermore, and perhaps even more importantly, the court gave Buchanan every opportunity to call those individuals whom he felt were essential to proving the existence of mitigating circumstances. He cannot now complain that the court erred by prohibiting the admission of hearsay when he had the option of introducing the direct testimony of the declarants themselves. If the testimony of these individuals was important to the demonstration of a mitigating factor, petitioner's counsel would clearly have taken the time to call those individuals into court. Indeed, even without the opportunity to quote statements made by the persons whom he had interviewed, Dr. Brown was able to provide a lengthy and detailed history of petitioner's mental and emotional history. Accordingly, the court must deny relief on Claim I of the petition.

**Claim IIA: The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.**

Petitioner next contends that the jury instructions at the sentencing phase of the trial were inadequate to inform jurors of all the mitigating factors which they could consider in

determining whether the death penalty should be imposed. However, a federal court should avoid attempting "to prescribe the particular form which state jury instructions on mitigation must take." Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985). In fact, in Jones v. Murray, 947 F.2d 1106 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992), the Court of Appeals for the Fourth Circuit reviewed jury instructions substantially similar to the instructions at Buchanan's trial and found that they satisfied the requirement for individualized sentencing under the Eighth and Fourteenth Amendments.[11] Specifically, the court in Jones held that an instruction directing a jury to consider "all the evidence" was sufficient to assure that the jury would weigh both mitigating and aggravating factors. 947 F.2d at 1120. In reaching its conclusion that the instructions were constitutionally adequate, the Fourth Circuit also noted favorably that the statutory verdict form used at Jones' trial, which was identical to the one used at petitioner's trial, required the jury to recite that it

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[11]In Jones, the court gave the following instructions to the jury:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> The Court instructs the Jury that even if you believe beyond a reasonable doubt that such facts and circumstances have been proven as to permit the Death Penalty, it is still the prerogative of the Jury to decide whether death should be the punishment or not, and the Jury is under no obligation or compulsion to find the punishment should be death.

947 F.2d at 1120.

In Buchanan's case, the trial court gave the following instructions to the jury:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that [the Defendant's] conduct in committing the murders...was outrageously or wantonly vile, horrible or inhuman, in that it involved torture depravity of mind or aggravated battery to...the victims, or to anyone of them.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or *if you believe from all the evidence that the death penalty is not justified*, then you shall fix the punishment of the defendant at life imprisonment.

(emphasis added)



had "considered the evidence in mitigation of the offense." Id. Accordingly, the court must deny relief on this ground.

**Claim IIB: The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.**

The Virginia Supreme Court expressly held that this claim was procedurally barred from state *habeas* review under the rule of Slayton v. Parrigan. 205 S.E.2d at 682. Buchanan admits that he did not litigate this claim at trial. Although counsel submitted several proposed jury instructions regarding mitigation evidence, which the court refused, they did not request an instruction stating that the jury need not unanimously agree upon particular mitigating factors in order to find mitigation of the death sentence.

Buchanan argues that his undisputed procedural default of this claim at trial should be excused because counsel provided constitutionally ineffective assistance when they failed to propose a unanimity instruction. However, petitioner did not present this ineffective assistance argument to the Virginia courts during *habeas* proceedings and does not present any excuse here for his failure to do so. As an unexhausted and defaulted ineffective assistance claim cannot serve as cause to excuse any other procedural default, the court is barred under the doctrine of procedural default from reviewing the merits of Claim IIB. See Justus, 897 F.2d at 713.

**Claim IIC: The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."**

Likewise, procedural default bars the court from reviewing the merits of this claim. Buchanan's trial counsel did not object to the penalty phase instruction on "vileness." Because

Buchanan never presented this claim to Virginia courts and would be barred from doing so now under Va. Code Ann. §8.01-654(B)(2) and Slayton, 205 S.E.2d at 682, the claim is also barred from review before this court unless Buchanan demonstrates sufficient excuse for his default. Teague, 489 U.S. at 297-98; Bassette, 915 F.2d at 936-37.

Buchanan argues that counsel's omission at trial represented constitutionally ineffective assistance of counsel which should serve as excuse for his default of the claim at trial and on direct appeal. However, Buchanan never presented to Virginia courts his ineffective assistance argument as cause to excuse his trial default of this claim, so the ineffective assistance claim itself is unexhausted and procedurally defaulted.. See Justus, 897 F.2d at 713. As a defaulted ineffective assistance claim cannot excuse petitioner's failure to present Claim IIC to Virginia courts, this court is barred from considering Claim IIC on the merits.

**Claim IID: The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.**

Buchanan bases his argument under Claim IID solely on evidence already presented in Claims IIA, IIB, and IIC. He asserts that jury instructions in his case, viewed in totality, were constitutionally inadequate because they failed to guide the jury in deciding both the aggravating factor (vileness) and mitigating factors, making the jury's verdict unreliable and, therefore, unconstitutional. The court has already determined above that instructions regarding mitigation were constitutionally adequate and that the claims regarding unanimity and vileness instructions are procedurally barred from federal *habeas* review. As petitioner has not presented any other argument or evidence in support of his totality claim, it, too, must be dismissed as meritless.



**Claim IIIA: Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.**

Buchanan's third claim is that the Virginia capital punishment statute, as interpreted by the Virginia Supreme Court and as applied in his case, is unconstitutional. As part of this claim, Buchanan argues that Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in his case.

The United States Supreme Court held in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor the law to avoid "the arbitrary and capricious infliction of the death penalty." The state must channel the discretion of the sentencer by providing the guidance of clear and objective standards for imposing the death penalty. Id. Because the proper degree of definition of these eligibility factors often "'is not susceptible of mathematical precision,' a review for vagueness is quite deferential." Tuilaepa v. California, 114 S.Ct. 2630, 2635 (1994), citing Walton v. Arizona, 497 U.S. 639 (1990). Under these standards, the Virginia capital punishment statute[12] has been upheld against constitutional vagueness challenges on several occasions. See, e.g. Hoke v. Commonwealth, 377 S.E.2d 595 (Va. 1989), cert. denied, 491 U.S. 910 (1989); Pope v. Commonwealth, 360 S.E.2d 352 (Va. 1987), cert. denied, 485 U.S. 1015 (1988); Gray v. Commonwealth, 356 S.E.2d 157, cert. denied, 484

[12]The death penalty statute, Va. Code Ann. § 19.2-264.2, provides:
In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.
In the case at hand, the jury was instructed only as to the vileness aggravator, and not on future dangerousness.

U.S. 873 (1987); Stockton v. Commonwealth, 314 S.E.2d 371, cert. denied sub nom Stockton v. Virginia, 469 U.S. 873 (1984); see also Gregg v. Georgia, 428 U.S. 153, 201 (1976) (no indication that reviewing court would construe vileness factors in Georgia statute so broadly that they could encompass any murder). The terms of the Virginia statute require that, in order to assess the death penalty upon a defendant convicted of capital murder, the sentencer must find either that the defendant poses a threat of future dangerousness or that the crime committed was outrageously or wantonly vile, horrible, or inhuman. The vileness aggravator is further defined in the statute as involving "torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2.

In Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978), cert. denied sub nom Smith v. Virginia, 441 U.S. 967 (1979), the Virginia Supreme Court reasoned that the language defining the vileness aggravator, when given a reasonable and natural interpretation, accomplished the Virginia legislature's intent to be selective in choosing the types of intentional homicide that would be subject to punishment by death. The court upheld the death penalty statute against petitioner's facial challenge. The court went on, however, to explain how the vileness factors should be interpreted:

> [W]e construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. . . . [W]e construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish and act of murder. . . . It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

Id. (citations omitted).



Following Smith, most cases addressing the issue of vague instructions or verdict forms in Virginia capital murder cases found that the trial court had included the explanatory language provided in the Virginia Supreme Court's opinion. In the federal courts, Virginia's vileness aggravator has been upheld in cases where the jury was instructed as to the meaning of the elements of the aggravator. See, e.g. Gray v. Thompson, 58 F.3d 59, 63 (4th Cir. 1995) (limiting instructions based on Smith meet constitutional standards); Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (same), cert. denied sub nom Turner v. Jabe, 115 S.Ct. 1359 (1995); Turner v. Bass, 753 F.2d 342, 353 (4th Cir. 1985) (jury instructed on meaning of "aggravated battery," but jury need not be instructed on each term of the vileness aggravator), reversed in part on other grounds, 476 U.S. 28 (1986). The Virginia Supreme Court has upheld the constitutionality of the vileness aggravator where the jury was instructed only on the bare words of the statute. In Clark v. Commonwealth, 257 S.E.2d 784, 790 (Va. 1979), cert. denied, 444 U.S. 1049 (1980), petitioner objected that the trial court had failed to define the terms of the statute in its sentencing instructions. At trial, the court explained that it felt the terms of the statute were a matter of common knowledge, but offered to consider any definitional instructions that counsel chose to submit. No instructions were submitted (in acceptable form), so none were given. The Virginia Supreme Court upheld the trial court's decision regarding the instructions, saying:

> We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error. Although in our review of this case we are guided by our definitions in Smith, it does not necessarily follow that these particular definitions were necessary for the jury to determine whether the conduct of [the defendant] was outrageously or wantonly vile,

horrible, or inhuman in that it involved depravity of mind or aggravated battery of the victim.

Id. at 790-91; see also Coppola v. Commonwealth, 257 S.E.2d 797, 804 (Va. 1979), cert. denied, 444 U.S. 1103 (1980) (not imperative that court define the words used in capital punishment statute; instructions which do not use precise language of Smith are not incorrect).

The instructions given in Buchanan's case resemble those given in Clark -- the trial court simply read the language of the statute as its instruction to the jury. It provided the jury with a verdict form which contained essentially the same language as the statute.[13] The trial court instructed the jury that, having found Buchanan guilty to capital murder, they must determine whether to impose a sentence of death or life in prison. Future dangerousness was not considered, but the court directed that

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McARTHUR Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

(Tr. Trans., v.6, p.1580). Although the instructions did not include further explanation, it is presumed that the Virginia Supreme Court incorporated the Smith interpretation in its direct and independent review of the trial and sentencing records. The Supreme Court concluded

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[13]The verdict form for the capital murder sentencing read:
We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.



that the evidence of guilt was sufficient to uphold the conviction, and that the same evidence was relied upon during the penalty phase to support the imposition of the death penalty. Buchanan, 384 S.E.2d at 774. "We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice." Id.

While the court believes the trial court might have explained the vileness aggravator beyond the language provided in the statute, it was not constitutionally required to do so. Even had the jury been misled or confused by the instruction, the appellate process assured that constitutionally narrow construction of the vileness aggravator was applied to the facts in this case. See Walton, 497 U.S. at 655-56; see also Lewis v. Jeffers, 497 U.S. 764, 779 (1990) ("Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' has been satisfied." (citations omitted)); Turner v. Williams, 35 F.3d at 893. Petitioner's claim that the aggravating factor of vileness was unconstitutionally vague as applied to his case is without merit.

**Claim IIIB: Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.**

Petitioner next argues that, because a jury may find an offense to be "vile" without reference to a capital defendant's prior history and character and because the Virginia Supreme Court has no mechanism by which to give effect to mitigating circumstances when there is such a finding, petitioner was deprived of an adequate appellate review of his sentence by

Virginia's capital sentencing scheme. In Turner v. Williams, the Fourth Circuit Court of Appeals reviewed Virginia's capital sentencing scheme under circumstances in which the jury had cited the "vileness" factor as its basis for imposing the death penalty. The Fourth Circuit held in Turner that Virginia provides meaningful appellate review for its death penalty cases. Specifically, the Turner court found that the Virginia Supreme Court's (1) determination of whether the imposition of the death penalty in a particular circumstance is the product of passion, prejudice or some other arbitrary factor, coupled with (2) a consideration of whether the penalty was excessive, in light of both the offense and the defendant himself and in relation to the punishment imposed in similar cases, satisfies the constitutional requirement of meaningful appellate review in death penalty cases. 35 F.3d at 893, citing Va. Code Ann. §17-110.1(C).[14]

In Buchanan's case, the Virginia Supreme Court, after hearing arguments and conducting an independent review of the record, specifically held that the death penalty had not been imposed as a result of the passion, prejudice or arbitrariness. The court also concluded that the imposition of the death penalty, under the particular circumstances of petitioner's offense, was not excessive or disproportionate. Although the court made no reference to petitioner's character or personal history, it was clearly authorized to take those factors into consideration under the provisions of Virginia Code §17-110.1(C); the statute

[14]Section 17-110.1(C) reads, in relevant part, as follows:
In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.



requires the appellate court to review the excessiveness of punishment while also "considering both the crime and the defendant." The court also stated specifically that its review process included consideration of the transcripts from Buchanan's sentencing hearing at which he presented his mitigation evidence.

Petitioner simply did not argue that his sentence was disproportional when viewed in the context of his own personal history. Rather, he challenged the procedures under which the death penalty was imposed at the sentencing phase of his trial. Petitioner cannot now bemoan the Virginia Supreme Court's failure to address all the mitigating circumstances of his offense when he himself did not even raise them as grounds upon which his death penalty should have been overturned. Accordingly, the court must deny relief on this ground, as well.

**Claim IIIC: Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.**

Buchanan admits that this claim was procedurally defaulted because it was not raised at trial; the Virginia Supreme Court also expressly held that the claim was barred from *habeas* review under Slayton v. Parrigan. 205 S.E.2d at 682. Petitioner argues that as any competent trial counsel would have objected to the verdict form, counsel's incompetent omission should serve as cause to excuse default of the claim. However, Buchanan did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. The ineffective assistance aspect of the claim is thus defaulted, Justus, 897 F.2d at 713, petitioner has failed to show cause for his default of the verdict form claim, and this court is barred from considering it on the merits. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

**Claim IIID: In capital murder/death sentence cases, Virginia does not provide meaningful appellate review and did not in Buchanan's case.**

Buchanan admits that, on direct appeal, he did not raise either a general challenge to the Virginia Supreme Court's review of death sentences or a specific challenge to the court's general review of his own sentence. When he raised these claims in *habeas* proceedings, the Virginia Supreme Court expressly held them barred under the rule of Slayton v. Parrigan. 205 S.E.2d at 682. Buchanan argues that it is absurd to expect a defendant to challenge the quality of appellate review in his own case in the very petition requesting that appellate review. The court must agree.

To serve as an independent and adequate state law ground sufficient to bar federal *habeas* review, a state procedural rule cannot force litigants to "resort to an arid ritual of meaningless form." Osborne v. Ohio, 495 U.S. 103, 124 (1990)(citations omitted). At the time he files an appeal of his death sentence, an appellant cannot know the quality of appellate review that will be given to that appeal. A rule forcing him to challenge the appeal in the appeal prevents him from bringing any factual support to his argument and requires him to assume that the appeal will be denied. Such a rule is not only illogical, but also tantamount to an admission that appellate review of death sentences is a meaningless ritual in Virginia, as the outcome is a foregone conclusion. An illogical and meaningless procedural requirement cannot stand as an independent and adequate state law ground to which a federal court must defer in *habeas* review.

Based on the foregoing, the court finds that Buchanan is procedurally barred at this point from raising a general challenge to the quality of appellate review of death sentences in



Virginia or to the constitutionality of the Virginia statute requiring appellate review of death sentences, Va. Code Ann. § 17-110.1(C),[15] as he could have raised such a claim on direct appeal, but did not. See Coleman, 501 U.S. at 750. However, the court also finds that to the extent which this claim challenges the appellate review of Buchanan's own death sentence, the claim is not procedurally barred. At the same time, the court must limit its review of the claim to those arguments and evidence presented to the state courts.

In support of his claim, Buchanan presents an affidavit from attorney Robert Godfrey concerning multiple murder cases decided by the Virginia Supreme Court at or before the time of Buchanan's appeal. Petitioner did not submit this affidavit to the state courts which have reviewed this claim, explaining merely that there was no point since the state courts would only find the claim procedurally barred under Slayton v. Parrigan. 205 S.E.2d at 682. Given Buchanan's strong argument that he could not effectively argue a claim about his own appeal in his appeal, it is conceivable that the Virginia *habeas* courts would have accepted this excuse and addressed his claim on the merits, had he also presented factual support for it. To present the claim before the state courts without all the supporting evidence denies those courts a meaningful opportunity to consider the claim itself and ignores the very purpose of the exhaustion requirement of §2254. As Buchanan offers no valid excuse for his failure to present Mr. Godfrey's affidavit to the state courts, this court is barred from considering it.

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[15]"In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992). This court must consider the claim solely based upon the facts which were also presented to the state *habeas* courts. Specifically, Buchanan alleges that 1) the Virginia Supreme Court did not adequately consider mitigating factors evidence, in determining whether the death sentence had been imposed arbitrarily, and 2) did not properly apply the Virginia proportionality review as required by statute. Va. Code Ann. § 17-110.1(C).

Federal constitutional protections in the death penalty context simply require that the death penalty not be imposed by a state in an arbitrary or capricious manner. Godfrey v. Georgia, 446 U.S. at 428. There is no constitutional right to any specific type of state appellate review of death sentences, although most of the statutes which have been upheld as constitutional include provisions for prompt and automatic appeal as one aspect of ensuring that the a death sentence was not arbitrarily or capriciously imposed. See Pulley v. Harris, 465 U.S. 37, 49-51 (1984). Thus, petitioner's claim must be analyzed on two fronts: 1) whether the Virginia Supreme Court correctly applied Virginia law in Buchanan's death penalty case and 2) whether the review petitioner received was adequate to satisfy the federal protections set forth in Godfrey.

The rule in Virginia is that the mitigating factors mentioned in the statute are not listed for the sentencer so that the jury is not misled into thinking those factors are the only ones which may be considered. Watkins v. Commonwealth, 331 S.E.2d 422, 438 (1985), cert. denied, 475 U.S. 1099 (1986). See also Zant v. Stephans, 462 U.S. 862, 890 (1983)(states not constitutionally required to adopt specific standards for instructing jury in its consideration of mitigating circumstances). Thus, there is no appellate review right in Virginia to determine



whether the jury's sentencing verdict complied with the mitigating factors listed in the Virginia Code. Indeed, the exclusion of evidence which prevents the sentencer from considering any mitigating factor or other relevant circumstance that could cause it to decline imposing death would run afoul of the federal guarantee that all those subject to the death penalty be treated as "uniquely individual human beings." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (emphasis added); see McCleskey v. Kemp, 481 U.S. 279, 306 (1987)(state cannot limit sentencer's consideration of any relevant circumstance that could cause it to decide against imposing death).

All that is required under Virginia law, then, is appellate review to determine if the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." Va Code § 17-110.1(C)(1). As discussed in Claim IIIB above, the Virginia Supreme Court analyzed the record of petitioner's sentencing and found that the death sentence was not arbitrarily imposed. Buchanan, 384 S.E.2d at 774. This court has undertaken an independent review of the sentencing phase transcript of Buchanan's trial and does not find fault with the decision of the Virginia Supreme Court. The sentencing jury heard numerous witnesses tell them about Buchanan's family background: how he was "cut off" from visiting, seeing, or talking to any of his maternal relatives when his mother died and his father re-married, how his grandparents had to go to court for the right to even visit with petitioner for four hours a week, about his father's and step-mother's difficulties with alcohol, about the number of times petitioner ran away from home, and about how that background affected his mental stability. They also heard about how Buchanan regularly attended church, that petitioner turned to substance abuse because of his family problems, about his honorable service in the

Army, about the role Christianne Buchanan may have played in encouraging petitioner to kill his family, and about what mental state Buchanan may have been in when he first started arguing with his father on the date of the killings. As the Virginia Supreme Court must have reviewed this evidence when reviewing the sentencing transcript, this court finds that Buchanan received an adequate appellate review of his death penalty case, including all mitigation evidence, in satisfaction of Virginia law and in satisfaction of the federal guarantee that the death penalty be imposed in a non-arbitrary manner.

Nor does Buchanan state a cognizable claim on the question of proportionality review by the Virginia Supreme Court. There is no federal right to proportionality review in a state death penalty case. Pulley v. Harris, 465 U.S. at 50-51. Petitioner's federal proportionality claim is, therefore, reduced to a question of due process -- whether the Virginia Supreme Court properly applied the proportionality statute, § 17-110.1(C), in his case. In determining whether a sentence of death is excessive, or disproportionate, the state supreme court need inquire only whether juries in the jurisdiction generally approve the supreme penalty for comparable or similar crimes. Pruett v. Commonwealth, 351 S.E.2d 1, 14 (1986), cert. denied, 482 U.S. 931 (1987). In Buchanan's case the Virginia Supreme Court stated:

> We have accumulated death penalty cases involving Code § 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that juries in Virginia customarily impose the death sentence in cases of this kind.

Buchanan, 384 S.E.2d at 774 (citations omitted).

The Fourth Circuit, in its consideration of Coleman v. Thompson, 895 F.2d 139, 146-47 (4th Cir. 1990), aff'd, 501 U.S. 722 (1991), found that the Virginia Supreme Court's



decision not to commute the petitioner's death sentence was supported by its "independent . . . determin[ation] that the sentence of death was properly imposed." The Fourth Circuit held that the Virginia court's review of Coleman's death sentence under Va. Code Ann. § 17-110.1(c) satisfied the constitutional requirements of channeling and limiting the sentencer's discretion to impose the death sentence. Id.

The proportionality review conducted by the Virginia Supreme Court in Coleman's case was nearly identical to that court's proportionality review of Buchanan's death sentence. See Coleman v. Commonwealth, 307 S.E.2d 864, 877 (Va. 1983), cert. denied, 465 U.S. 1109 (1984); cf. Buchanan, 384 S.E. 2d at 774. The Fourth Circuit found that this proportionality review satisfied the requirements of Va. Code Ann. § 17-110.1(C). Coleman, 895 F.2d at 147. Thus, it is clear that Buchanan received the full extent of proportionality review to which he was entitled under Virginia law, and, accordingly, that he was not denied due process in violation of the Fourteenth Amendment.

**Claim IIIE: Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.**

All of petitioner's arguments in support of this claim are simply repetition of earlier claims which the court has found to be procedurally barred from federal review or to be without merit. Accordingly, this claim also must be dismissed.

**Claim IV: The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.**

Respondent argues that this claim is procedurally barred from federal review because when Buchanan presented it on direct appeal, he did not assert that failure to instruct the jury on second degree murder violated his federal constitutional right to due process. It is clear

that the Virginia Supreme Court analyzed the claim as though it were brought under Virginia law only and found it meritless. In his *habeas* pleadings, Buchanan repeated the claim, but added language contending that failure to give the instruction violated his federal constitutional right to due process. In denying *habeas* relief, the state circuit court found that the federal constitutional claim was barred by the default rule of Slayton v. Parrigan. 205 S.E.2d at 682. The Virginia Supreme Court also applied the Slayton rule to the second degree murder instruction claim "to the extent [it] advance[d] matters not asserted on direct appeal." Petitioner argues that because the state and federal claims are all but identical in factual and legal analysis, he has presented the Virginia Supreme Court with the substance of the federal claim in satisfaction of the §2254 exhaustion requirement.

The United States Supreme Court has expressly held that §2254 requires a federal *habeas* petitioner to present the state courts with a "fair opportunity" (1) to address the "substance of his federal *habeas corpus* claim" and (2) "to apply controlling legal principles to the facts bearing upon" that claim. Anderson v. Harless, 459 U.S. 4, 6 (1982), citing Picard v. Conner, 404 U.S. 270, 276-78 (1971). See also Duncan v. Henry, 115 S.Ct. 887, 888 (1995)(citing Harless, held that failure to exhaust federal due process aspect of *habeas* claim regarding state trial court's evidentiary ruling was insufficient to satisfy §2254 exhaustion requirement). "It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim" was presented to them. Harless, 459 U.S. at 6. Petitioner's presentation of his claim must "fairly apprise a reviewing court of a potential federal claim" or he has failed to satisfy §2254 exhaustion requirements. Id. at 7 n. 3.



After review of Buchanan's direct appeal, the court finds that his presentation of his second-degree murder instruction claim did not "fairly apprise" the Virginia Supreme Court that he was raising the claim under both Commonwealth law and federal constitutional law. He does not mention the words "federal" or "constitutional" nor does he cite any federal case law in his argument supporting the claim. Under Harless and §2254, this court must find that Claim IV as raised in this petition was not adequately presented in Buchanan's direct appeal to satisfy exhaustion requirements. Although Buchanan has now exhausted the federal claim by presenting it to the state courts during *habeas* proceedings, he offers no viable excuse for his procedural default of the claim on direct appeal. Accordingly, the Virginia Supreme Court denial of *habeas* relief under Slayton serves as an independent and adequate state law bar to federal review; this court is barred from review of the merits of Claim IV. Coleman, 501 U.S. at 750.

Petitioner apparently argues that the court should recognize an exception to the strict pleading requirements set forth in Harless where, as here, the state and federal claims are all but identical. See Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984), cert. denied, 469 U.S. 893 (1984)("Virginia and the Circuit and the Supreme courts agree that lesser-included offense instructions are not required where . . . there is no support for such instructions in the evidence"). See also Hopper v. Evans, 456 U.S. 605, 611-12 (1982)(federal rule is that lesser included offense instruction need be given only if evidence would permit jury rationally to find defendant guilty of the lesser offense and acquit him of the greater). The court cannot agree. Before the Virginia Supreme Court, Buchanan clearly sought relief under state law. He gave

the state court no inkling of an intention to implicate the broader reaches of federal due process law as well.

Even assuming that the federal constitutional claim were not procedurally barred, the court finds no merit to the claim. To convict a person of first degree murder, where felony murder is not involved, the prosecution must prove that the killing was "willful, deliberate, and premeditated." Va. Code Ann. §18.2-32. Therefore, to prove entitlement to a second-degree murder instruction, petitioner would have to demonstrate that the evidence at trial supported a rational finding by the jury that Buchanan did not form an intent to kill each of his four victims before inflicting the fatal wounds upon them. See Smith v. Commonwealth, 261 S.E.2d 550, 553 (Va. 1980)(to premeditate means to adopt a specific intent to kill, and premeditation is what distinguishes first and second-degree murder).

On direct appeal, the Virginia Supreme Court addressed the issue of whether the evidence supported a second degree murder instruction as to his father's killing, reviewing in detail Buchanan's various attempts to explain his state of mind and why the killings happened. In the end, the court held:

> We are of the opinion that Buchanan was not entitled to a second degree murder instruction regarding his father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill. Buchanan did not say he killed in anger. He did not say he felt provoked. He did not say he shot without thinking. His father had broken off the disagreement and turned his back to walk out the door when Buchanan - having time to think and, by his own admission, intending to kill - shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." Giarrantano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). See Barnes v. Commonwealth, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); Bradshaw v. Commonwealth, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell,



> Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction; this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation.

Buchanan, 384 S.E.2d at 770-71. This court is not bound under §2254 to presume these findings correct, as the issue at stake is a mixed question of law and fact, requiring de novo review of both. However, after review of the record, the court fully agrees with the Virginia Supreme Court's findings.

From the physical evidence alone, a jury could not rationally have found that Buchanan did not form an intent to kill each of his victims. All of the victims had multiple wounds; even if an initial wound was inflected unintentionally or in the heat of anger or hurt, his subsequent attacks on each of the victims demonstrate an intent to kill that victim. After shooting his father, and later Donnie, once in the head, he fired a single, follow up shot into each victim's head at point blank range. When J.J. got up after a shot to the head, Buchanan went in the other room to get a knife and stabbed the boy numerous times until he could no longer get up. Buchanan admitted in statements his intent to kill Geraldine. He covered all trace of the killings in the livingroom and paced the floor, waiting for her to come home, his weapons at the ready. He stated, "I wasn't going to leave there until I killed her." And he has never denied wearing rubber gloves the entire afternoon during the killings; this fact alone is a strong indication of premeditation, as the only common sense reason to wear gloves when going to the house was to prevent leaving fingerprints at the scene of an intended crime.

Buchanan's testimony about his state of mind is both inconsistent with his physical acts and insufficient to support a rational finding of anything less than intent to kill. He testified

that he did not plan to kill that afternoon, but also testified to specific planning he and Christianne had done the previous evening. He testified that "it just happened" and that he went "crazy" after killing his father, but the fact that he does not understand his actions now cannot counteract other testimony and physical facts indicating that he had, in fact, formed an intent to kill each victim before inflicting a fatal wound. Buchanan said that he was ready to leave when the boys came home, blocking his escape through the front door, but he did not leave or explain why he could not have left out another door. He admitted that nothing anyone had done "set it off at this particular time." Simply put, the court is of the opinion that nothing in the evidence provided basis upon which a jury could rationally have found Buchanan guilty of anything less than first degree murder and that Buchanan is not entitled to *habeas* relief on this claim. Hopper, 456 U.S. at 611-12.

**Claim V: During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).**

Buchanan admits that counsel failed to submit any instruction to the trial court concerning a definition of transaction or to argue on direct appeal that the court erred in failing to give such an instruction. In denying petitioner's *habeas* appeal, the Virginia Supreme Court expressly held the claim barred under the default rule of Slayton. Even if Buchanan contends that the default was caused by constitutionally ineffective assistance of counsel, as he failed to raise these allegations about counsel before the state courts in any proceeding, the ineffective assistance claim is defaulted and cannot serve as cause to excuse the default of the underlying claim itself. Justus, 897 F.2d at 713. Thus, this court is barred from addressing Claim V on the merits. Coleman, 501 U.S. at 750.



**Claim VI: Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."**

In Claim VI, petitioner asserts that the multiple murder provision of Virginia's capital murder statute is unconstitutionally vague, because it fails to define the word "transaction." Section 18.2-31 of the Virginia Code provides, in pertinent part:

> Capital murdered defined; punishment. The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . .
>
> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction.[16]

Buchanan contends that the word "transaction" is susceptible to many different definitions and interpretations. As a result, he claims that the use of the word "transaction" in Virginia Code § 18.2-31(7), when applied to his case, violated his Sixth, Eighth, and Fourteenth Amendment rights. Challenging the statute on its face, petitioner argues that the language of the statute encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances for which a defendant could become eligible for the death penalty. The Commonwealth responds that the statute was sufficiently clear to have put petitioner on notice that his conduct was prohibited.

The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v.

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[16]The subsections of Va. Code § 18.2-31 were recently renumbered. At the time petitioner committed the murders, the relevant subsection was designated as subsection (g). This subsection was originally added to the capital murder statute in 1981, and was intended to add multiple murders as a crime that qualified for capital treatment. The language of the renumbered section is identical.

Lawson, 461 U.S. 352, 357 (1983) (citing Hoffman Estates v. Flipside, 455 U.S. 489 (1982); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926)). The United States Supreme Court in Kolender further explained that:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, 415 U.S. at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. at 575.

461 U.S. at 357-58. Based on this analysis, the loitering statute at issue in Kolander was voided for vagueness because it did not explain what was intended by the requirement that an individual present police officers with "credible and reliable" identification upon being stopped and questioned. Id. at 361. "[The statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." Id.

The Virginia courts have adopted the vagueness standards and rationale of the federal courts. In Flannery v. City of Norfolk, 218 S.E.2d 730, 733 (Va. 1975), the Virginia Supreme Court adopted the words of the United States Supreme Court to explain that:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."



(quoting Colton v. Kentucky, 407 U.S. 104, 110 (1972)). The Virginia court also noted that it would consider whether the words at issue in a vagueness challenge have a well-settled common law meaning and whether the language has been narrowed through judicial decisions. Id.

The Virginia Supreme Court applied these standards when it examined the same capital murder provision now challenged by petitioner. In Woodfin v. Commonwealth, 372 S.E.2d 377 (Va. 1988), the state court rejected the criminal defendant's contention that the phrase "same act or transaction" as used in the capital murder statute is unconstitutionally vague.[17] An analysis of the statutory language showed that it was sufficient to give an ordinary person notice that his contemplated conduct was forbidden and that the statute did not encourage selective law enforcement. Id. at 379. The court stated:

> In the context of this statute, there is nothing uncertain or ambiguous about the phrase "same act or transaction" when applied to defendant's actions. The language is synonymous with "same criminal episode." State v. Boyd, 533 P.2d 795, 799 (1975). In other words, two offenses arise out of the "same act or transaction" if they are connected so closely "in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." State v. Fitzgerald, 516 P.2d 1280, 1284 (1973).
>
> In the present case, the evidence shows that two murders were committed at the same location, about the same time, and under the same circumstances. Therefore, given his conduct, the defendant reasonably should have been on notice that the statute applied to his actions when it defined capital murder as killing "more than one person as a part of the same act or transaction." Thus, the statute satisfies the constitutional requirement

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[17]More specifically, the court in Woodfin rejected the facial challenge to the statute outright, concluding that the defendant/appellant had no standing to make such a challenge where he did not contend that his conduct was constitutionally protected or that the First Amendment was implicated. 372 S.E.2d at 379. The court addressed only the narrow question of whether the statute was vague as applied to the defendant/appellant's conduct in that case. Id.

of definiteness and complies with the standard forbidding arbitrary and erratic law enforcement.

Id. at 379.

Petitioner argues that the holding in Woodfin should not influence the vagueness analysis in his case, since Woodfin was decided months after petitioner was convicted and sentenced. He asserts that at the time he committed his crimes, the statutory language was unclear as to what conduct would be considered part of the same "transaction." In short, petitioner contends that because there was no judicial limitation placed upon the statutory language at the time he committed the murders, the statute was unconstitutionally vague as applied to him.

The court rejects this argument, and agrees with the Commonwealth that the language of the statute itself was sufficiently clear to notify the defendant that his course of conduct was prohibited. As the Virginia Supreme Court found during consideration of petitioner's direct appeal, the "four murders were committed at the same place, under the same circumstances, within a narrow time span." Buchanan v. Commonwealth, 384 S.E.2d at 771. Therefore, as applied to petitioner, the term "transaction" clearly encompassed all of the criminal acts committed over the time span during which the murders occurred. A person of ordinary intelligence who was in petitioner's position at the time the murders were committed certainly would have understood that the statutory language prohibited those acts. Furthermore, in the situation at hand, there is no support for the proposition that the capital murder statute was enforced in an arbitrary manner. As the court is of the opinion that the Virginia statute passes



constitutional scrutiny under the vagueness doctrine, petitioner is not entitled to relief on this claim.

**Claim VIIA: Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.**

In Claim VII of his *habeas* request, petitioner asserts that he was denied due process, assistance of counsel, and the right to present evidence because the indictments against him were framed in a vague and inappropriate manner. In the first part of this claim, petitioner says that the indictments failed to inform him of what the Commonwealth intended to prove and on which alleged "transaction" it intended to make its case.

Long-established principle holds that an accused must be informed as to the charges against him so that he may prepare his defense and not be taken by surprise at trial. See Berger v. United States, 295 U.S. 78, 82 (1935). In addition, an indictment must provide adequate notice of the charges against the defendant so that he may be protected against another prosecution for the same offense. Id. It is also well-established, however, that an indictment is sufficient if it sets forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611, 612 (1881). "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124 U.S. 483, 487 (1888). See also United States v. American Waste Fiber Co., 809

F.2d 1044, 1046 (4th Cir. 1987) (indictment must alert defendant and counsel to all necessary elements of offense charged and be sufficiently detailed to be pled in another prosecution to avoid double jeopardy).

Buchanan protests that the capital murder indictments against him were constitutionally insufficient to provide him notice of the charges against him. Petitioner was eventually tried on three separate capital murder indictments. The first indictment (No. 5784) charged petitioner with violating the capital murder statute through the premeditated killing of Buchanan, Sr. "as a part of the same act or transaction of" the premeditated killing of "one or more other persons, to-wit: Joel Jerry Buchanan, Christopher Donald Buchanan, or Geraldine Patterson Buchanan." The second capital murder indictment (No. 5947) included two counts -- count one charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Christopher Donald Buchanan; and count two charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Geraldine Buchanan. The third capital murder indictment (No. 5948) also contained two counts -- count one alleges that petitioner murdered, in the same transaction, Christopher Donald Buchanan and Joel Jerry Buchanan; and count two alleges that petitioner murdered, in the same transaction, Joel Jerry Buchanan and Geraldine Patterson Buchanan.

Buchanan argues that, because of the manner in which the indictments were framed, he was not sufficiently notified of the charges against which he was asked to defend. Specifically, the defendant asserts that he was not properly notified as to which "transaction" the Commonwealth intended to prove.



As the Virginia Supreme Court pointed out during petitioner's direct appeal, however, the Commonwealth is entitled to charge the commission of a single offense in several different ways in order to meet the contingencies of proof. Buchanan, 384 S.E.2d at 762 (citing Bryant v. Commonwealth, 53 S.E.2d 54, 56 (Va. 1949) and R. Bacigal, Virginia Criminal Procedure § 13-6 (1983)). In this case, because Buchanan could theoretically have been convicted on two counts of capital murder, each involving two different victims, the Commonwealth was justified in outlining the different possible permutations of "transaction" under which petitioner might have been found guilty. The indictments themselves are adequately clear as to which transactions the Commonwealth was entitled to try to prove. Buchanan was given sufficient notice that he was defending against all of the possible "transactions" described in the indictments. In other words, the indictments alerted petitioner to the fact that the Government had several alternative theories under which it was seeking a capital murder conviction. One theory (shown by indictments no. 5784 and no. 5947) was that petitioner murdered Buchanan, Sr. and one or more of the other victims in the same transaction. This theory encompasses all transactions which involve the killing of Buchanan, Sr. The second theory (contained in count one of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Christopher Donald Buchanan in the same transaction. And another theory (from count two of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Geraldine Buchanan in the same transaction. The court is of the opinion that the indictments very clearly state the different possible transactions, and that the Commonwealth is entitled to pursue alternative theories in a criminal trial. Buchanan was not denied due process, effective

assistance of counsel, or the right to present evidence simply because he was forced to defend against alternate charges.

**Claim VIIB: The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the numb[illegible] of indictments.**

The second part of petitioner's claim concerning the multiple capital murder indictments against him is that the trial court unconstitutionally limited his defense counsel's opening statement by refusing to allow any discussion of the number of the indictments in the case. Buchanan asserts that this restriction resulted in a denial of due process, the effective assistance of counsel, and the right to present evidence.

The court is of the opinion that this argument is also without merit. Petitioner did not have a constitutional right to give an opening statement, and a trial court has the authority to place restrictions upon subjects to be commented on during opening statements. See, e.g. United States v. Odone, 888 F.2d 1014 (4th Cir. 1989) (trial judge attempted to set forth ground rules for opening statements; when one defendant failed to comply, court had the discretion to sever the trial of that defendant); United States v. West, 877 F.2d 281 (4th Cir. 1989) (trial court justified in stripping defendant of *pro se* status when he did not follow restrictions placed upon his opening statement); Arnold v. Eastern AirLines, 681 F.2d 186 (4th Cir. 1982) (trial court justified in prohibiting comments about the defendant's settlement practices); United States v. Pinkerman, 374 F.2d 988 (4th Cir. 1967) (trial court prohibited government from mentioning defendant's incriminating statements during opening remarks).

It is not the function of the opening statement "to apprise the accused of every aspect of the charges against him -- that is done by the indictment." Butler v. United States, 191 F.2d



433, 435 (4th Cir. 1950). By the same token, the opening statements of counsel are not intended to inform the jury as to the specific elements of the crimes involved. Rather, opening statements are intended to give the jury an objective summary of the evidence that each side expects to produce. United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986). At the close of the evidence, it is the function of the trial court to give instructions on the specific findings that the jury must make in order to convict the defendant of a particular charge. The court finds that the restrictions the trial court placed upon the parties' opening statements in this case were within its discretion and did not affect the constitutional rights of petitioner.

**Claim VIII: The trial court unconstitutionally denied Buchanan's motion for change of venue.**

Part A of Claim VIII, concerning general pretrial publicity, was first raised by petitioner in his motion for change of venue; the claim was properly exhausted when raised on direct appeal and was not procedurally defaulted. However, Part B of Claim VIII is procedurally barred because the issue of false information in the pretrial publicity was not mentioned in Buchanan's motions at trial for change of venue or raised in his direct appeal. The Virginia Supreme Court noted on direct appeal that Buchanan had not complained of false publicity as a grounds for his venue motion; then, in state *habeas*, the Supreme Court found the venue change claim barred under the rule of Slayton to the extent that it raised a matter not asserted on direct appeal. Ineffective assistance of counsel cannot serve as cause for this default, as no allegations concerning counsel's ineffectiveness were raised in the state *habeas*

courts to excuse the Slayton default and as Buchanan has not offered any explanation for this omission. Justus, 897 F.2d at 713.

; Likewise, the court is barred under Keeney from considering any evidence concerning false information in pretrial publicity as supporting evidence for Part A of the claim, as petitioner argues. 504 U.S. at 8. Simply presenting evidence of the publicity to the state courts was not the equivalent of proving information in that publicity to be patently false and, therefore, prejudicial. Buchanan has not offered any reason for his failure to develop the false information evidence in the trial motions or in the direct appeal; the very fact that the Virginia Supreme Court noted this failure in making its decision on direct appeal suggests that the decision on appeal might have been different if the trial court had been faced with clearly false information in pretrial publicity. This situation is an excellent example of the reasoning behind application of default rules to development of supporting evidence in state court proceedings. If the state courts are not presented with a fair representation of petitioner's claims and all the relevant proof of those claims, they are not being presented with a fair opportunity to correct their own constitutional errors. Because Buchanan failed to develop his false information evidence before the state trial and appellate courts, this court is barred from considering Claim VIIIB, either as a separate claim or as additional information in support of Claim VIIIA. Id. and Coleman 501 U.S. at 750.

In Claim VIIIA, Buchanan essentially claims that the court denied him his Sixth Amendment right to an impartial jury because the trial judge refused to grant his motion for a change of venue based on general, pretrial publicity. Buchanan avers that potential jurors in Amherst County had been so inundated by local pretrial publicity, which would prejudice them



against him from the start, that the only way for him to receive a fair trial was for the court to grant the venue change.

; Where pretrial publicity raises a possibility of jury bias, the court has a constitutional duty to explore through adequate *voir dire* the impact, if any, which such publicity has had on jurors' ability to be impartial. See Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987). The trial court need not question venire persons on the content of publicity to which they were exposed so long as *voir dire* is adequate to determine if prospective jurors could remain impartial despite pretrial publicity and decide the case only upon the evidence presented to them during trial. Mu'Min v. Virginia, 500 U.S. 415, 427 (1991). A reviewing court should not easily second guess the trial court's *voir dire* because it is the trial judge who must reach factual conclusions regarding impartiality and credibility by relying on demeanor evidence and responses to questions. Rosales-Lopez v. United States, 451 U.S. 182, 188-90 (1981). A trial judge's decision not to change venue, because he believes an impartial jury can be seated, will only be overturned by a reviewing court for "manifest error." Irvin v. Dowd, 366 U.S. 717, 723 (1961) (emphasis added).

There is no evidence provided by petitioner in either the initial petition or any of the papers filed in opposition to the respondent's motion which even hints at a violation of petitioner's right to an impartial jury. Though the trial court acknowledged that there had been some publication of the facts surrounding the murders and the trial of Buchanan's wife, Christianne, Buchanan's prospective jury members, when questioned during *voir dire*, did not exhibit the sort of partiality and pretrial publicity knowledge which would have necessitated a

change of venue or which would lead a reviewing court to find that the jury had been tainted. See Patton v. Yount, 467 U.S. 1025, 1026 (1984).

Unlike Shepard v. Maxwell, 384 U.S. 333, 347 (1966), in which the judge refused to question the venire persons about the effect of media publicity, in Buchanan's case the judge was very careful to ask prospective jurors if they were aware of the case and if they could put aside what they had heard from any other source and decide the matter based solely on the evidence presented at trial. Only two jurors, Donald Hendrick and Albert Hartberger, exhibited an inability to put aside what they had heard about the trial, and they were dismissed for cause by the court. (Trial Tr. 41-45, 154-163). Other jurors evidenced only minimal to moderate knowledge about the events surrounding the trial, and, to a person, they all said they could put what they had previously heard behind them.[18]

Buchanan points to one lone article detailing his wife's conviction as his proof that venue should have been changed. That showing does not rise to the level at which this court would find that the trial judge abused his discretion when he did not grant the change of venue motion. The evidence shows quite the opposite, in fact, and this court finds that "[s]electing the jury was relatively easy, . . . the publicity was accurate and noninflammatory, and . . .

[18]Of the twelve jurors and two alternates actually seated, Jerry Baker (Tr. 45-63), Strother Snead (Tr. 172), Thomas Cheryba (Tr. 321-22), George Speidell (Tr. 417), Joseph Liggon (Tr. 426), Mark Shrader (Tr. 577), and Linda Laughlin (Tr. 590), were moderately aware of the circumstances surrounding the murder and some were also cognizant that Christianne Buchanan had been convicted a few days earlier as an accomplice to the murder. The other members of the selected jury panel: Thomas Hardy (Tr. 193-94), Myra Ramsey (Tr. 277), Juanita Roberson (Tr. 308-09), Audrey Hudnall (Tr. 438), John L. Smith (Tr. 463-64), Diane Young (Tr. 500), and Margaret Cash (509-10), only exhibited minimal knowledge of the murders and Christianne's trial. Similar patterns can also be seen with the jurors stricken for cause by the court (most of whom were dismissed because of an inability to impose the death penalty) as well as among those who were removed through the use of challenges used by the trial counsel.



there was no indication [among the venire persons] of 'widespread prejudice.'" Buchanan, 384 S.E.2d at 768. Petitioner is not entitled to relief on this claim.

**Claim IXA: The trial court refused to let defense counsel ask jurors if each believed that a death sentence is the only appropriate sentence for capital murder.**

Buchanan argues that the trial court denied him due process by erroneously refusing to allow Buchanan's counsel to ask prospective jurors, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" This claim is without merit. Buchanan relies upon Morgan v. Illinois, which held that a defendant must be allowed to inquire whether a juror would "automatically vote for the death penalty in every case." 504 U.S. 719, 729 (1992). However, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. Mu'Min, 500 U.S. at 424-26. The trial court told Buchanan's counsel, "I don't object to you asking in a different way about whether [the juror] would automatically give the death penalty," and the trial court directly asked the prospective jurors if they could consider voting for a sentence less than death. (Tr. at 234, 253).

Buchanan's counsel agreed that the trial court had asked the questions required by law. (Tr. at 253). The trial court explained that the reason for disallowing the proposed line of inquiry was the question's argumentative nature. (Tr. at 247-255). The trial judge also objected to proposed questions regarding the "appropriate punishment" for capital murder without explanation of the punishments legally available for capital murder. The trial court explained, "[t]he jury is not considered to be a group of lawyers who know all the legal answers." (Tr. at 291-2). The trial court allowed Buchanan's counsel to ask clear, re-phrased Morgan-type questions of prospective jurors, as demonstrated in the following examples:

To Mrs. Rhodes:
"Do you understand that if the defendant is convicted of capital murder that the death penalty is not automatic in those cases? . . . Do you have any religious or personal or ethical beliefs that would require you to vote for the death penalty and not consider life imprisonment?"

To Mr. Cheryba:
[I]f Douglas McArthur Buchanan, Jr.--that's him, Doug here--is convicted of capital murder, would you feel incumbent to impose the death penalty or would you follow the law and consider each of the criteria as instructed by the court . . . and make up your mind based on the evidence and the law?

To Mrs. Giles:
Do you understand that the death penalty--even if he is convicted of capital murder, the death penalty is not automatic? . . . You understand that the jury has to listen to all of the evidence, both in his favor and against him, and then decide whether . . . death is the appropriate punishment or life imprisonment is the appropriate punishment? . . . [Y]ou would be willing to consider life imprisonment if you felt like the facts merited that?

The court allowed counsel to ask Mr. Lewandoski the following questions:

Do you believe if you heard this case and decided, based on the evidence, to impose a life sentence rather than the death penalty that you would be under any pressure from--or that you would catch any hard--ill feelings from the people at work . . . Do you feel like you can consider everything--every factor that comes into evidence in this case and fairly consider the possibility of a life sentence with that pressure in the background [from people at work who felt the only choice for Buchanan's punishment was the death penalty]?"

When Mr. Lewandowski said no to the second question, the court followed up with questions of its own: "What you're saying is that you feel--you would feel an undue amount of pressure from people who would see you after the case was over if you had voted for some punishment that they didn't approve of? . . .So would that affect your decision in the cases, do you think? Do you have some reasonable doubt about it in your mind?" Mr. Lewandowski answered, "Yeah, I think I do. Yes." The court dismissed him from the case immediately. See Tr. at 267, 335, 349-350, 371-374.



As these examples make clear, the trial court met the constitutional requirements set out in Morgan, 504 U.S. at 729. The Virginia Supreme Court ruled on direct appeal that the trial court had correctly refused the tendered question. Buchanan, 384 S.E.2d at 765. The trial court afforded ample opportunity for counsel to ask relevant questions, and the questions actually allowed and asked by the trial court were sufficient to preserve Buchanan's right to a trial by a fair and impartial jury. U.S. Const., amend. VI and XIV.

**Claim IXB: The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.**

As stated above, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. Mu'min, 500 U.S. at 424-26. A defendant is constitutionally entitled only to know whether a juror can remain impartial in light of information that juror has previously obtained, not to explore the specific content of the acquired information. Id. at 431. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." Irvin, 366 U.S. at 722. The material inquiry in *voir dire* is not whether jurors know details about the case, or even that they have some impressions about what may have happened, based on what they have read or heard. The material inquiry is whether the jurors have "such fixed opinions that they could not judge impartially the guilt of the defendant." Patton, 467 U.S. at 1035.

Not long into the *voir dire* process, Buchanan's counsel asked Juror Hartberger, "No what impressions do you have about Douglas' involvement in the case from what you've read? . . . You believe he did it from what you read?" Mr. Hartberger answered, "from what I read, I'd have to say yes. . . . [T]he newspapers, the television and everything has kind of

impressed upon me that there's no doubt he's guilty." The court questioned Mr. Hartberger further about whether he could put aside what he had read and judge the case only upon the evidence presented to him at trial. Mr. Hartberger said that he thought he could. He said, "I've never said that he's guilty. I said if I believed what the newspaper said, then I would assume that he was guilty." The court dismissed this juror for cause, but admonished Buchanan's attorneys not to ask jurors about their impressions of the case or to pose hypothetical questions about what jurors believed about the case based on newspaper reports. Buchanan claims these limitations prevented him from determining whether or not jurors retained the ability to be impartial. He further alleges that the questions asked and allowed by the court suggested the answers jurors should give if they wanted to serve on the jury. (See Tr. 153-68)

The court finds no merit to this claim. While the trial court's questions to jurors about pretrial publicity were, for the most part, answerable with a yes or a no, they are precisely the sort of *voir dire* questions which were found constitutionally adequate in Mu'min to evaluate juror impartiality.[19] 500 U.S. at 420. From the court's questions, counsel discovered the

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[19]The court in Mu'min asked the following questions:
Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case? . . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, [do you believe] that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

The court in Buchanan's case asked Mr. Hartberger the following questions:
Now have you read about these cases in the newspaper? . . . And have you heard and seen about them on television? . . . [H]ave you heard anything on the radio? . . . Have you heard the case discussed by other people not in the news media?

After Mr. Hartberger answered in the affirmative to all of these questions, the court asked:
Now, will such information as you have received from those sources affect your impartiality in this case? . . . Can you try the case based solely on the law and the evidence you hear in court? . . . And not be affected



specific news media to which each juror had been exposed, if not the specific content of each article or news report he had seen or specific impressions he had gained from them. The court asked numerous questions, from different angles, about the affect, if any, which exposure to pretrial publicity might have on the juror's ability to decide the case on the evidence presented at trial. The court rephrased each question at least once to be sure the juror understood him and that he understood the juror's response.

After a thorough review of the transcript, this court agrees with the Virginia Supreme Court's assessment of *voir dire* in Buchanan's case:

> The trial court's questions were not leading, but were proper, fair, and evenhanded. Moreover, it appears that Buchanan's so-called open ended nonleading questions were nothing more than efforts to engage prospective jurors in rambling, unspecific, unfocused dialogues far removed from the core concern of *voir dire*, which is to determine whether jurors stand indifferent in the cause."

384 S.E.2d at 765 n.2. See also Mu'min, at 420. The trial court did not commit constitutional error in disallowing the tendered questions or in conducting *voir dire*. This claim must be dismissed as meritless.

**Claim IXC: The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them. See Witherspoon v. Illinois, 391 U.S. 510 (1968).**

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or influenced in any way by what you previously heard or read or seen about the case? . . . Have you yourself expressed or formed any opinion as to the guilt or innocence of the accused? . . . Considering what you have heard or read or seen on television about the case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching any fixed opinion or conclusion as to the guilt or innocence of the accused? . . . Do you have any doubt in your mind? . . . You can try the case based on what you hear in court? . . . Do you know of any bias or prejudice either against the Commonwealth or the accused that you might have? . . . Do you know now of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely upon the law and the evidence in the case?

Buchanan admits that his Witherspoon claim was defaulted at trial. The trial court dismissed five jurors for cause, based upon their express opposition to the death penalty in response to the court's *voir dire* questions. Counsel failed to object to any of these dismissals or to request an opportunity to rehabilitate them. Although Buchanan raised the claim on direct appeal, the Virginia Supreme Court found it barred under Rule 5:25 of the Virginia Supreme Court Rules, based on counsel's failure to rehabilitate, or otherwise object, at trial.[20] Petitioner did argue in his state *habeas* petition that counsel was ineffective during *voir dire* in making and preserving objections to specific actions by the court. Even assuming that this vague reference is sufficient to constitute exhaustion of a claim that counsel were ineffective in their handling of Witherspoon jurors, in order to show cause and prejudice for his default, petitioner must first prevail on the ineffectiveness claim itself, by demonstrating incompetence and resulting prejudice as defined in Strickland v. Washington. Murray v. Carrier, 477 U.S. at 487-89. As the court finds no evidence that any of the five Witherspoon jurors could have been rehabilitated, it is the opinion of the court that counsel were not incompetent when they did not seek to rehabilitate those jurors.

Under Witherspoon as slightly modified in later cases, a capital juror may be dismissed for cause only if the "juror's views would 'prevent or substantially impair the performance of his duties as a juror." Wainwright v. Witt, 469 U.S. 412, 424 (1985)(modifying Witherspoon test). This determination regarding a juror's views need not be made with "unmistakable clarity"; it is sufficient if the trial judge is "left with the definite impression that a prospective

[20]Rule 5:25 states in relevant part:
Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.



juror would be unable to faithfully and impartially apply the law." Id. at 426. Neither Witherspoon nor Witt indicate that the trial judge must withhold his determination about a death-opposed juror until after defense counsel has had opportunity to attempt rehabilitation of that juror. Accordingly, the court is somewhat confused by the phrasing of petitioner's claim, but will assume that petitioner's primary concern is the alleged failure of the trial court adequately to explore the Witherspoon/Witt question, whether through additional questions from the court or through questions by defense counsel, in order to ensure Buchanan a fair trial.

As stated, the court finds no evidence that Buchanan was denied a fair trial because the trial court did not question the Witherspoon jurors further about their ability to impose the death penalty despite their views against it. Based on the jurors' answers to the trial court's questions, the court is satisfied that the trial court met all Witherspoon/Witt requirements before dismissing the jurors.[21] Petitioner does not here suggest any specific rehabilitation

[21]Following are relevant excerpts from the trial court's questioning of the five jurors in question.

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| The Court: | In cases involving capital punishment, do you have any opinion such as to prevent your convicting anyone of an offense punishable with death? |
| | . . . . |
| Mrs. Warrick: | No. |
| The Court: | Do you have such an opinion that you could never vote to impose the death penalty in a case? Ma'am? |
| Mrs. Warrick: | No. |
| The Court: | You could never vote to impose the death penalty? |
| Mrs. Warrick: | No. |
| The Court: | You could not? |
| Mrs. Warrick: | No. |
| The Court: | All right, you're excused . . . . |
| | |
| The Court: | Do you have an opinion such as to prevent your convicting anyone of an offense punishable with death? |
| Mr. Renalds: | Yes, sir. |
| The Court: | In other words, if the offense of capital murder under Virginia law is punished with either death or life, if he's convicted of that offense, either a life sentence or death–so you have such an opinion of the death penalty that you would not convict someone of that offense |

questions which should have been asked of the jurors before dismissal, and the court can think of none which would not have been redundant or futile; Witherspoon does not require the court to badger potential jurors into questioning their firm beliefs against capital punishment. Counsel could reasonably have believed that these jurors could not be rehabilitated, based on their strongly expressed views in opposition to the death penalty. Accordingly, the court finds that Buchanan has failed to demonstrate that his attorneys were incompetent in failing to object to the court's dismissal of the jurors or to seek to ask their own rehabilitation questions. Where a petitioner fails to demonstrate incompetence, the court need not inquire into the prejudice prong of the Strickland standard; petitioner's ineffectiveness claim fails. 466 U.S. at

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| | which may be punishable with death? Is that what you say? |
| Mr. Renalds: | I believe so, sir. |
| The Court: | All right. You're excused . . . . |
| The Court: | First, in cases involving capital punishment, do you have any such opinion such as to prevent your convicting anyone of an offense punishable with death? |
| Mrs. Weigand: | I couldn't. |
| The Court: | So you couldn't convict anybody if the possibility was life or death? |
| Mrs. Weigand: | I could not convict anybody if the penalty was death. |
| The Court: | . . . . [Here, the court explained that capital murder cases are decided in two phases, a guilt phase and a sentencing phase where the two sentencing choices are life or death] And the question I'm asking you on the guilt part of it or innocence part of it, could you vote for convicting a person of capital murder knowing that when you got to the penalty phase the penalty would either be life or death? |
| Mrs. Weigand: | No. |
| The Court: | So you could not convict anyone in a case like that? All right you're excused. . . . |
| The Court: | Now do you have any opinion such as would prevent your—you from convicting anyone of an offense punishable with death? |
| Ms. Taylor: | I don't think I could do that. |
| The Court: | you could not even—you could not convict somebody to begin with of such an offense even though the offense were punishable with life or death? |
| Ms. Taylor: | I don't think I could, no. |
| The Court: | So where the death penalty was one possibility and life sentence was the only other possibility, you don't think you could convict a person of such a crime? |
| Ms. Taylor: | No, sir. |
| The Court: | Anyone have any further questions on that point? All right, you're excused, Ms. Taylor. |



697. Accordingly, the court finds the Witherspoon claim to be procedurally defaulted and, therefore, barred from further federal review. Harris, 489 U.S. at 262.

**Claim XA. The trial court failed to sequester the jury.**

As with Claim IV, Buchanan raised Claim XA on direct appeal as a matter of state law, but did not allege that the court's omission also violated the United States Constitution or cite any federal case law. On direct appeal, the Virginia Supreme Court treated the claim as one raised under state law and found it meritless. Then, when petitioner raised the claim in state *habeas*, the Virginia Supreme Court found the federal constitutional claim concerning sequestration to be barred, pursuant to Slayton. 205 S.E.2d at 682. Under the same analysis as detailed under Claim IV above, the court finds federal review of this claim to be barred by petitioner's procedural default on direct appeal. Harless, 459 U.S. at 6-7.

Again, petitioner argues that the court should address the merits of his claim, since the state and federal claims regarding sequestration of the jury are practically identical. Even assuming that Virginia law and federal constitutional law on this issue are similar and that the claim is somehow preserved for federal *habeas* review, the court finds petitioner's claim meritless. Criminal defendants have no constitutional right to a sequestered jury, but they do have the right to a fair trial. In cases where publicity surrounding a criminal trial is pervasive and prejudicial, the court has inherent power and even a duty to minimize the effects of the publicity on the fairness of the trial through such measures as sequestration of the jury. See Sheppard, 384 U.S. at 357-59. In the Sheppard case, the United States Supreme Court found the extent of publicity, both before and during trial, was so extreme and so pervaded the trial process that the defendant was denied his constitutional right to a fair trial. The Court

specifically found that under the unique media blitz that had surrounded Sheppard's trial, the trial judge should have sequestered the jury on his own motion. Id. at 351. To succeed on his sequestration claim, however, Buchanan must show that failure to sequester the jury so affected the fundamental fairness of his trial as to violate due process. Bowman v. Bordenkircher, 522 F.2d 209, 210-11 (4th Cir. 1975). The court finds that he has not met this burden.

First, he has not presented evidence indicating that the extent of the publicity in his case reached nearly the proportions of the media interference in the Sheppard case or the other cases therein cited in which courts presumed prejudice from media coverage. In Sheppard's case, the media publicized the names and addresses of prospective jurors and, as a result, venire persons received anonymous letters and telephone calls, along with calls from acquaintances, about the upcoming trial. Sheppard, 384 U.S. at 342. Before trial, news reports emphasized evidence against Sheppard, pointed out discrepancies in his statements to police, and reported supposed "facts" about him and the case which were never brought out in trial testimony or evidence. One radio station was allowed to set up broadcasting facilities in the room where jurors rested during court recesses and deliberated. Id. at 343. Newscasts originated from this room throughout the trial and during jury deliberations. Outside the courthouse, television and other cameras snapped pictures of the jury and judge; one broadcast included an interview with the judge as he came into the courthouse. Jurors were also photographed during *voir dire* and during trial. Newspapers had access to the daily record of trial proceedings and witness testimony was printed verbatim in local papers, along with objections and judicial rulings. Pictures of jurors appeared more than 40 times in local papers.



On the contrary, Buchanan has not presented to this court any direct evidence of the extent of the media coverage of his trial. In the record, the court found a photocopied article about the killings and Christianne's upcoming trial and a front page newspaper article published after her conviction for first degree murder before the same judge who would later preside over Buchanan's trial; the judge is quoted in the second article as stating that he had no doubt about Christianne's guilt on the first degree murder charges. The second article appeared four days before Buchanan's trial began.[22] Buchanan also asserts that there was daily coverage of the trial in the media, although he presents absolutely no evidence of such coverage or its specific contents.

Any capital murder case is bound to engender media coverage, but to prevail in his sequestration claim, Buchanan must present evidence that the coverage affected the fairness of proceedings. Buchanan does not suggest that members of the media interfered with the jurors directly, as they did in Sheppard's case. Nor does he demonstrate that any of information about the killings, which was presented by the media before and during his trial, was not also presented to the jury during trial proceedings.[23] Sequestration would not have prevented the influence the pretrial articles about the case or his wife's trial may have had on potential jurors.[24]

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[22]The court notes that because Christianne Buchanan's trial was not a jury trial, she could only have been convicted if the judge felt she was guilty beyond a reasonable doubt, as the judge rendered the verdict.

[23]As indicated above, Claim VIIIA, petitioner does claim that false information about a possible financial motive behind the killings did appear in media reports. However, the court cannot consider that allegation in review of this claim or any other claim as petitioner failed to present it to the state courts.

[24]The trial court addressed the influence of this and other pretrial publicity during *voir dire*, as discussed above in the analysis of Claim VIII concerning the court's failure to grant a change of venue based on pretrial publicity.

Furthermore, the trial court took steps to ensure that the jury remained impartial. *Voir dire* has been discussed at length above. At the end of court each day of Buchanan's trial, the trial judge admonished jurors to avoid media coverage and conversations with others about the trial. He also emphasized to the jurors that they must decide the case based only upon the evidence presented to them in the trial proceedings. On direct appeal, Buchanan asserted that "[t]here [was] no way for the court to know who the jurors talked to or what papers they read during the six days of the trial." The court finds no indication that jurors disobeyed the judge's daily admonitions concerning media coverage or that they were exposed to any prejudicial media coverage during the trial itself. Finding that petitioner has not presented any genuine issue of material fact concerning his claim that failure to sequester the jury resulted in a fundamentally unfair trial, it is the opinion of the court that no evidentiary hearing on this matter is warranted and that the claim must be dismissed as meritless.

**Claim XB: The trial court failed to grant additional peremptory challenges during jury selection.**

Respondent does not argue that this claim is defaulted, although petitioner failed to pose this claim specifically as a federal constitutional claim on direct appeal. Buchanan does, however, cite Gray v. Mississippi, 481 U.S. 648, 663 (1987), a United States Supreme Court case which addresses a constitutional claim involving, at least indirectly, additional preemptory challenges in a death penalty case. Citation of this case may be said to "fairly apprise" the Virginia Supreme Court that Buchanan was attempting to raise the claim under both Virginia law and constitutional law; therefore, the court finds this claim to be exhausted and not defaulted under Harless. 459 U.S. at 6-7. See also, Renzi v. Commonwealth, 794 F.2d 155,



158 (4th Cir. 1986)(designation of due process claim and citation of federal case sufficient to satisfy §2254 exhaustion and meet Harless test).

Although Gray v. Mississippi does provide reference to a constitutional claim regarding additional peremptory challenges in a death penalty case, the decision is profoundly unhelpful to Buchanan. The Court in Gray did not find a constitutional right to additional peremptory challenges. 481 U.S. at 663. In fact, the Supreme Court found the trial court's exclusion of the venire person in Gray to be reversible error. Id. Peremptory challenges are not required by the Constitution. Ross v. Oklahoma 487 U.S. 81, 88 (1988). The Court in Ross stated that peremptory challenges should, therefore, be treated similarly to other potentially state-created rights; thus, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law requires." 487 U.S. at 89.

The Virginia Supreme Court has declared that "[t]here is no basis in Virginia law for additional peremptory strikes." Buchanan, 384 S.E.2d at 767; See also O'Dell v. Commonwealth 364 S.E.2d 491, 501 (Va. 1988). The trial court did not err in failing to grant additional peremptory challenges to Buchanan. Although Buchanan may have fairly apprised lower courts of a federal constitutional question concerning peremptory challenges, that question is easily answered: there is no separate federal right to peremptory challenges and Buchanan "received that which state law require[d]," in satisfaction of federal due process directives. Ross, 487 U.S. at 89.

**Claim XI: Imposition of the death penalty constitutes cruel and unusual punishment.**

This claim raising a general constitutional challenge to any imposition of the death penalty was not presented to the state courts in petitioner's previous proceedings, and it is,

thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. See Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

**Claim XIIA: Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.**

Petitioner asserts that his trial counsel was ineffective for failing to advise him to plead guilty to four indictments charging him with first degree murder.[25] Petitioner argues that under Virginia law he had an absolute right to plead guilty to the whole of any of the indictments against him. If Buchanan had entered a guilty plea to the indictments charging him with first degree murder, he believes, double jeopardy would have prevented the Commonwealth from prosecuting him on the capital charges. The Commonwealth responds that petitioner's understanding of the double jeopardy implications of a guilty plea is faulty in this case, where the indictments on first degree murder and those on capital murder were tried in a single proceeding. Although the court recognizes that the merits of petitioner's double jeopardy argument in the plea context are unclear under current Virginia law, it is of the

[25]A total of fourteen separate indictments were returned against Buchanan. The first four alleged capital murder for killing Buchanan, Sr. and one or more of the other victims in a single transaction. Three of these indictments were later quashed as being redundant of the first. The grand jury then returned two capital murder indictments, each containing two counts which described different possible double murder transactions. Four other indictments charged petitioner with the use of a firearm in the commission of a murder. Finally, four first-degree murder indictments were returned for the individual murders of each of the victims. Petitioner was initially arraigned on the original four capital murder indictments and the four firearms indictments. He was rearraigned just before trial on three capital murder indictments, four firearms indictments, and four first-degree indictments. Petitioner now asserts that he should have been advised to plead guilty to the four first-degree murder indictments and that by doing so, the Commonwealth would have been barred, on double jeopardy grounds, from prosecuting the capital murder indictments.



opinion that counsel were not ineffective for failing to raise this issue or in failing to advise Buchanan to plead guilty at the time this case was tried.

At the outset, it is important to note the standards governing an ineffective assistance of counsel claim. The sixth amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court adopted a two-prong test for determining whether a defendant was denied effective assistance. The first prong is incompetence. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. Id. at 688. A strong presumption exists that the defendant's counsel acted within his professional discretion and provided reasonable service. A reviewing court will be highly deferential in scrutinizing the performance of counsel. Id. at 688-89; Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991), cert. denied, -- U.S. -- (1992)(best course for *habeas* court is to credit trial counsel's plausible strategic choices).

The second prong of the Strickland test is prejudice. The *habeas* petitioner must be able to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694; see Hutchins v. Garrison, 724 F.2d 1425, 1431 (4th Cir. 1983) (burden on petitioner to show prejudice), cert. denied, 464 U.S. 1065 (1984); Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977) (incorrect advice or trial error must be prejudicial).

In this case, determining whether Buchanan was prejudiced by counsel's actions requires an examination of the underlying merits of petitioner's double jeopardy argument. In

support of his position, petitioner first points to the case of Graham v. Commonwealth, 397 S.E.2d 270, 271 (Va.App. 1990), in which the Virginia Court of Appeals held that the Virginia Constitution and laws give a criminal defendant the absolute right to plead guilty to the whole of any indictment against him. The court may reject such a guilty plea only if it believes that the plea was not made intelligently, voluntarily, and knowingly, in accordance with federal Constitutional requirements. Id. at 273.[26] Petitioner next relies upon several Virginia state and federal cases which hold that a guilty plea is the equivalent of a conviction. See Kercheval v. United States, 274 U.S. 220, 223 (1927) (guilty plea is a conviction, and like a jury verdict, is conclusive); Knight v. Johnson, 529 F.Supp. 1309, 1322 (E.D.Va. 1982) (court should not have required defendant to go through full trial after accepting guilty plea), rev'd 699 F.2d 162 (4th Cir. 1983) (court entitled to hear all evidence necessary to understand the case and affix an appropriate sentence), cert. denied 464 U.S. 832 (1983); Hancock v. Slayton, 341 F.Supp. 436, 439 (W.D.Va. 1972) (because guilty plea is a self-imposed conviction, defendant usually cannot appeal unless it appears the plea was coerced); Miracle v. Peyton, 176 S.E.2d 339, 341 (Va. 1970) (a voluntary plea of guilty is a conviction and nothing is left but the imposition of the prescribed punishment). Finally, Buchanan notes that the double jeopardy clause embodies three guarantees, including protection against a second prosecution for the same offense after a conviction. See North Carolina v. Pearce, 395

[26]In Graham, the defendant was charged in a single indictment and initially entered a plea of not guilty. After the Commonwealth had presented its evidence at trial, however, the defendant informed the court that he wished to change his plea to guilty. The court refused to accept the plea, saying that the defendant's offer came too late. 397 S.E.2d at 272. The Court of Appeals reversed, noting that while the United States Constitution did not provide a defendant with the absolute right to plead guilty, the Virginia Constitution and Virginia Code § 19.2-254 did grant defendants that right. Id.



U.S. 711, 717 (1969). Based on these principles, he argues that had he pled guilty to the first degree murder indictments, the trial court would have been required to accept his plea, and that conviction would have precluded the Commonwealth from prosecuting the capital murder indictments on double jeopardy grounds.

The Commonwealth responds that Buchanan's understanding of double jeopardy in this situation is erroneous, and asserts that the United States Supreme Court's decision in Ohio v. Johnson, 467 U.S. 493 (1984), is controlling. In that case, the defendant attempted to plead guilty to several counts of a single indictment. The trial court accepted the guilty pleas to counts that were lesser included offenses of other crimes charged in the indictment, and then granted the defendant's motion to dismiss the remaining charges, reasoning that prosecution of those charges would be barred by double jeopardy. The Supreme Court reversed, stating that the double jeopardy clause was not implicated by continuing prosecution of the charges remaining in the indictment. The Court explained that the defendant had not yet been exposed to conviction on the charges to which he had pled not guilty, and the state had not had the opportunity to marshal its evidence or resources more than once. Id. at 501. In conclusion, the Court stated: "[n]otwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the state from completing its prosecution on the remaining charges." Id. at 502.

The Commonwealth also points to the decision of the Virginia Court of Appeals in Rea v. Commonwealth, 421 S.E.2d 464 (Va.App. 1992). The procedural facts of that case are remarkably similar to the case at hand. The defendant in Rea was charged in multiple indictments of first degree murder and capital murder. When arraigned on all of the charges,

the defendant pled guilty to three first-degree murder indictments, and not guilty to the remaining charges, including three counts of capital murder. Id. at 466. The court found the guilty pleas to be proper, but decided to defer consideration of the pleas and submit the remaining charges to the jury. Id. The jury convicted the defendant of three capital murders, and the trial judge then convicted the defendant, based on his guilty pleas, of three first degree murders.[27] Id. The defendant was sentenced to imprisonment for nine life terms plus forty-seven years. On appeal, the court held that double jeopardy protected the defendant from multiple punishments for the same crime and vacated the three first degree convictions and sentences. Id. at 468. The defendant also argued on appeal that the court erred by withholding judgment on the guilty pleas, because acceptance of those pleas would have barred the Commonwealth from prosecuting the capital murder charges. Id. at 467. The Court of Appeals rejected this contention, however, noting that the defendant had been arraigned on all of the indictments on the same day: "By electing to plead guilty to three charges and not guilty to the remainder, defendant neither 'transformed the single prosecution into two separate prosecutions nor captured for himself any special protections against successive prosecutions under the double jeopardy clause.'" Id. (citing Walker v. Commonwealth, 415 S.E.2d 446, 447 (Va.App. 1992)) (other citations omitted). The court concluded that the defendant's multiple convictions were obtained in a single trial and therefore were not barred by double

[27]In entering the first degree murder convictions based upon the defendant's guilty pleas, the trial court noted that "there were only three victims . . . and accordingly there can only . . . be three convictions of homicide. But . . . this is a case of first impression in . . . Virginia . . . and the Court believes that the matter should be resolved by the Appellate Court *as to the issue of whether his pleas of guilty to first degree murder . . . actually placed him in jeopardy of the capital murder convictions.* And, of course, the Appellate Court [may] vacate the convictions [it] finds . . . [in]appropriate." Rea, 421 S.E.2d at 466 n.1 (emphasis added).



jeopardy. Id. Where multiple convictions are obtained in a single proceeding, only the double jeopardy guarantee against multiple punishments is implicated. Brown v. Ohio, 432 U.S. 161, 165 (1977) (where consecutive sentences are imposed at a single criminal trial, the double jeopardy guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense); Turner v. Commonwealth, 273 S.E.2d 36, 46-47 (Va. 1980).

Assuming that Rea is currently the controlling state law for the facts of the case at hand,[28] Voir dire cannot legitimately argue that he was prejudiced by counsel's failure to suggest a guilty plea on the first-degree murder indictments. Rea, along with Ohio v. Johnson, suggests that even if petitioner had attempted to plead guilty to the first degree murder indictments, the court would have allowed the Commonwealth to prosecute the capital charges.

Perhaps more importantly, the court notes that neither the Graham nor Rea decision had been rendered at the time Buchanan was tried. The double jeopardy argument now raised by petitioner in his request for *habeas* relief had no foundation at the time his trial counsel were preparing his defense. Counsel could not have predicted whether the trial court would have accepted the reasoning later adopted in Graham, or followed the procedure approved in Rea. Indeed, as the Commonwealth points out, Ohio v. Johnson was the controlling case on this issue at the time of trial. Based on the principle articulated in that case, counsel could

[28]As the Rea court made no reference to its previous decision in Graham, it is unclear what force the Graham holding may have outside of the context of a single indictment. In Sullivan v. Commonwealth, 420 S.E.2d 724 (Va.App. 1992), on rehearing 433 S.E.2d 508 (Va.App. 1993), the defendant raised a double jeopardy argument similar to the one advocated here. The court did not reach a decision on the issue, however, as they were able to decide the case on other grounds.

legitimately have believed that a guilty plea by Buchanan would not prevent the Commonwealth from prosecuting the capital murder charges. According to objective measures of reasonableness, then, the court believes that it was not incompetent for petitioner's trial counsel to fail to anticipate an argument that may have been asserted following the rule announced in Graham. See Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) (case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law). Since the issue of prejudice is at best unclear, and because the court does not believe counsel acted improperly, Buchanan has failed to meet either prong of the Strickland test and is not entitled to relief on this claim.

**Claim XIIB: Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.**

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no viable excuse for his default of state procedural rules for appeal and *habeas*, this court is also barred from review of the claim. Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

**Claim XIIC: Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.**

Buchanan believes that recusal was warranted because the same judge who sat on the bench for petitioner's trial also presided over the trial of petitioner's wife, Christianne Buchanan. Petitioner further claims that the trial judge was quoted in the local newspaper,



just days before petitioner's trial began, stating that the jury was justified in finding Christianne Buchanan guilty of first degree murder.

In order to prevail on an ineffective assistance of counsel claim Buchanan would have to show both that his counsel was ineffective and that some prejudice resulted from counsel's defective performance. Strickland, 466 U.S. at 687. A justified contention of actual prejudice is therefore, necessary to successfully make out an ineffective assistance of counsel claim. In his state *habeas* petition, petitioner claimed that prejudice attached to his trial because the judge seated jurors who were aware of the publicity and predisposed to reject petitioner's evidence that he was only guilty of second degree murder. That however, is not the assignment of prejudice that petitioner claims in his federal *habeas* petition. Now Buchanan asserts that the trial judge showed his own predisposition to disregard the evidence of second degree murder and prejudice resulted when the trial judge refused to give a second degree murder instruction to the jury.

Such inconsistencies between state and federal collateral appeal petitions lead to a factual default of petitioner's federal declaration of prejudice. See Keeney, 504 U.S. at 8. Though both the federal and state *habeas* petition ineffective assistance of counsel claims revolve around the trial judge's statement to the press following Christianne Buchanan's trial and an allegation that the statement somehow prejudiced Buchanan's attempt to argue second degree murder, the allegations of prejudice are quite different. The state petition pointed to the jury as the cause of the problem, and now petitioner raises concerns about the judge's own state of mind. Without any proper claim of prejudice, this claim raised by petitioner fails on its face.

However, even if the claim were not defaulted or if some part of it survived default, petitioner's allegations here would fail on their merits. First of all, as stated earlier, the facts surrounding the murders of Buchanan's father, step-mother, and half-brothers simply did not warrant a second degree murder instruction. Petitioner simply cannot avoid the fact that consideration of a second degree murder conviction was not warranted by either the judge or the jury. Further, by making a statement to the press regarding Christianne Buchanan's guilt the trial judge was not making any determination about petitioner's guilt and petitioner does not claim that the trial judge failed to instruct the jury about considering only evidence presented during his trial, nor does petitioner bring forth any evidence to show that the jury was actually tainted by the judge's pre-trial statement regarding Christianne Buchanan's guilt.

With regard to petitioner's claim that his trial was one warranting recusal in the first instance, the court notes that a judge is assumed not to confuse evidence in one trial before him with facts presented in another case. See Dove v. Peyton, 343 F.2d 210, 214 (4th Cir. 1965). If petitioner's contention held any weight, judicial recusal would be required in any set of cases in which multiple defendants were tried separately and such a far sweeping rule has never been adopted by any court. See id. In addition, matters of judicial bias arising from public interest in a case are largely matters of state legislative concern and generally do not rise to the level of federal constitutional proportions. Tumey v. Ohio, 273 U.S. 510, 523 (1927); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

If Buchanan had any basis for seeking his trial judge's recusal based on the facts presented, it would have arisen under Virginia statutory or case law. In Virginia, judicial recusal is almost always a matter of discretion. Justus v. Commonwealth, 283 S.E.2d 905, 908



(Va. 1981), cert. denied, 455 U.S. 983 (1982), and public attention to a case is not a sufficient reason to warrant judicial recusal even when public pressure seeking the death penalty is brought to bear on the judge. Royal v. Commonwealth, 458 S.E.2d 575, 580 (Va. 1995).

Petitioner cannot make out any claim here. The proper application of Keeney leaves him without a declaration of prejudice on which to base his ineffective assistance of counsel claim. However, even if petitioner were left with any sort of contention that the trial judge's statement to the press regarding Christianne Buchanan's conviction somehow, in and of itself, prejudiced his own trial, whether because of the judge's actions or the jury's, that claim is completely insupportable on the merits as set forth above.

**Claim XIID: Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.**

Buchanan claims that as a result of counsel's acceptance of the jury, some jurors were "improperly seated" and that counsel's waiver prejudiced his appeal to the Virginia Supreme Court. This allegation is meritless. As direct support for his claim of improperly seated jurors, petitioner points to Juror Cecil Banton. However, this juror was not among the fourteen venire persons ultimately seated on the jury (Tr. 609),[29] and there is no indication in the record that he, or any person who actually became part of the seated jury, would automatically "vote for death if given a choice of punishments," as Buchanan alleges in his

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[29]Counsel for defense used a peremptory challenge to remove Juror Banton from the venire. Petitioner argues in his *habeas* pleadings that "it is prejudicial error [under Virginia law] for the trial court to force a defendant to use the peremptory strike afforded him . . . to exclude a venireman who is not free from exception." Justus v. Commonwealth, 266 S.E.2d 87, 90 (Va. 1980). Yet, Buchanan's present claim focuses on counsel's ineffectiveness in failing to make and preserve objections to the jurors in the first place, not upon the errors of the trial court. Thus, the court will not address the court's alleged error in regards to the use of a peremptory challenge to remove Mr. Banton.

petition. In fact, Mr. Banton, in response to questioning by the defense counsel, said "I would follow the court and make up my own mind." (Tr. 133). Further, James Jedelsky was the only juror who actually indicated he might "vote for death" in the fashion contended by Buchanan in his petition. Mr. Jedelsky was excused for cause by the trial judge because he exhibited a strong feeling in support of the death penalty and indicated he might inject his feelings about the escalating crime rate into petitioner's trial (Tr. 545-46). Thus, the court finds no indication that any seated jurors were unacceptable in the manner petitioner alleges and, accordingly, that counsel were not ineffective for stating, in the jurors' presence, that the jury was "acceptable." See Strickland, 466 U.S. at 689 (court will be deferential to performance of counsel in order to balance distorting effects of hindsight).

In addition, counsel's decision to state that jurors were acceptable to Buchanan was part of a tactical strategy. Counsel had contacted the National Association of Criminal Defense Lawyers and the Southern Poverty Law Center before Buchanan's trial to ask for advice about defending a capital murder trial. The materials these organizations provided to Buchanan's counsel included a recommendation that the defendant should participate in selection of jurors and that jurors to whom counsel had previously objected should be told directly that the defendant "accepts" them as jurors to try his case, in an effort to encourage jurors' commitment to a fair evaluation of the evidence. Petitioner argues that this strategy had no factual basis because the jurors themselves had not heard counsel's previous objections. The court finds the strategy to be a reasonable attempt to influence the jury toward fairness in Buchanan's case. In any event, the court cannot second-guess a reasonable strategic decision by counsel, see Stamper v. Muncie, 944 F.2d 170, 177-78 (4th Cir. 1991), especially where



the court finds no indication that Buchanan's right to an impartial jury was prejudiced in any way by counsel's statement. This claim must be dismissed as meritless.

**Claim XIIE: Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.**

Counsel's statement allegedly made on April 26, 1988, the day the trial began, that Buchanan was guilty of either capital or first degree murder, does not make out an ineffective assistance of counsel claim. Buchanan asserts that counsel's statement before trial, which was quoted in the papers, could have prejudiced the non-sequestered jury and denied him a fair trial. Petitioner essentially argues that he was entitled to have the jury consider a second degree murder charge, see supra, and counsel's statement made on the eve of trial prejudiced the jury against making such a determination. There are two ways the alleged prejudice may have attached to petitioner's trial: 1) the jury may have decided the case based on the pre-trial statements of counsel, not the evidence presented during the case, or 2) counsel's statement may have prejudiced the defendant's request for a second degree murder charge. First, the record clearly demonstrates that the defense, in its opening statement, explained that petitioner killed his family (Tr. at 639-55). At the conclusion of the opening statement the defense attorney explained that if each murder was separate from the others and not part of the same transaction, they should come back with four first degree murder verdicts. Thus, even if the jurors were aware of counsel's alleged pre-trial statement to the press, they heard essentially the same thing during defense counsel's opening address and there was no resulting prejudice.

Nor can petitioner show any prejudice attached to his request for a second degree murder charge as a result of his counsel's pre-trial statement. As noted in the analysis of

Claim IV, the trial court determined that Buchanan was not entitled to a second degree murder based on the evidence presented at trial. This court agrees with the trial court and the Virginia Supreme Court's determination that there were no significant facts supporting giving the lesser charge. Buchanan, 384 S.E.2d at 769; Hopper v. Evans, 456 U.S. at 611 (Virginia and federal standard both require instructions on lesser included offenses only where evidence supports a rational finding of that offense by factfinder). In Virginia, a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." Clark v. Commonwealth, 257 S.E.2d 784, 789 (1979), cert. denied, 444 U.S. 1049 (1980). Neither the law of Virginia, nor the facts, supported giving a second degree murder instruction to the jury. Thus, Buchanan has failed to make an adequate showing of prejudice on either ground and is not entitled to relief on Claim XIIE.

**Claim XIIF: Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.**

Petitioner also argues that his trial counsel was ineffective for failing to object to Mr. Meeks' prosecution of the case. The Commonwealth Attorney had previously represented Buchanan's grandparents against his father in contested visitation proceedings involving Buchanan in 1984 (2/17/94 Tr. 1).[30] The grandparents alleged during the custody proceeding that petitioner was being abused and that led him to run away from home on several occasions. Mr. Meeks explained the situation to the trial judge and to petitioner's trial counsel. Buchanan's

[30]Although petitioner claims that the Commonwealth's Attorney, Mr. Meeks, represented him in juvenile court when he was a runaway, state *habeas* proceedings indicated that Meeks' representation of Buchanan's maternal grandparents was his only professional connection to Buchanan's previous court appearances. Buchanan offers no evidence to the contrary in his present petition.



trial counsel examined the record and determined that there was no conflict and the trial judge did not perceive a problem with Mr. Meeks' representation of the Commonwealth (2/17/88 Tr. 2).

This court cannot say that the defense counsel's acceptance of Mr. Meeks' representation of the people constituted anything other than valid trial strategy under Strickland. In addition, while a prosecutor's participation in a case has been found prejudicial if he has represented the defendant in the past, See United States v. Schell, 775 F.2d 559, 565 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986), Mr. Meeks' role in legal proceedings involving Buchanan was much more attenuated and did not rise to the level of constitutional concern. If anything, counsel could reasonably have believed that the Commonwealth Attorney's awareness of petitioner's difficult childhood would only help Buchanan's situation. Douglas Buchanan admitted to killing his family and only wished to persuade the jury that the killings were: 1)a set of separate occurrences and not one "transaction," and 2)committed in the heat of passion. In order to prove the latter during the sentencing phase, Buchanan put on evidence about his mother's death and his stepmother's treatment of him. Mr. Meeks was aware of all that and the sympathy such knowledge would engender could only have helped petitioner at trial.

Further, the only specific "fact" of prejudice which petitioner brings forth deals with Mr. Meeks' cross examination of Buchanan's aunt, Audrey Bowling, at the change of venue motion of February 17, 1988. Ms. Bowling was testifying regarding the adverse publicity the case had received and appeared as a witness for the defense in favor of changing venue. (2/17/88 Tr. 5-14). However, Mr. Meeks asked only one question which had anything to do with the prior custody disputes: "Weren't you a participant in the custody -- in the fight for the custody, I believe you were a witness in that, weren't you?" (2/17/88 Tr. 12). That inquiry was intended only to bring

out Ms. Bowling's bias in favor of her nephew and could have been asked by any other Commonwealth's attorney. Mr. Meeks' participation in the earlier custody dispute simply did not provide him with a "leg up" in Ms. Bowling's examination, as petitioner alleges. According to petitioner's own statement of the arguments supporting this court's grant of the writ, then, this court can find no prejudice under Strickland because Mr. Meeks' cross examination of Ms. Bowling at the change of venue motion was not substantially enhanced by his previous representation of Buchanan's grandparents in the custody dispute. 466 U.S. at 689.

**Claim XIIG(1): Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.**

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. See Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

**Claim XIIG(2): Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.**

Buchanan also asserts that his counsel were ineffective in failing to object to the trial court's order that the report of defense psychiatrist Dr. Robert Brown be turned over to the Commonwealth and its expert witnesses prior to the sentencing phase of his trial. Buchanan also complains that his counsel failed to demand a simultaneous exchange with the report of the Commonwealth's expert witnesses.



The same standards for determining ineffective assistance of counsel applicable to trial also apply to claims of ineffective assistance at the penalty phase of a capital trial. Strickland, 466 U.S. at 686. Accordingly, assessing the conduct of counsel here requires an effort to eliminate the distorting effects of hindsight, and an attempt to understand the conduct from the attorneys' perspective at the time their decisions were made. Id. at 689. Buchanan has the burden of showing that the actions of counsel were both incompetent and prejudicial according to the Strickland interpretation of those terms.

The Commonwealth establishes that the conduct of petitioner's trial counsel was neither incompetent nor prejudicial. Respondent points to Va. Code Ann. §19.2-264.3:1D, which requires a criminal defendant who wishes to present psychiatric or psychological evidence as a mitigating consideration during the penalty phase of a capital murder trial to provide the Commonwealth "the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation . . . ." Likewise, subsection F of Virginia Code section 19.2-264.3:1 requires a criminal defendant who wishes to use psychiatric evidence to submit to an evaluation by experts for the Commonwealth. After the Commonwealth's experts perform their evaluations, they are required to report their findings to the attorneys for the Commonwealth and for the defense. Va. Code Ann. § 19.2-264.3:1F(1).

The actions of defense counsel in the present case demonstrate that they were aware of the provisions of the Virginia statute and reasonably assumed that an objection to the trial court's order to turn over Dr. Brown's report would easily be overruled. Also, the record

indicates that the Commonwealth did request its experts to conduct an evaluation of the defendant, and that the experts sent their findings to the Commonwealth's Attorney and to the attorneys for the defendant approximately one week before the sentencing phase of the trial was conducted. The actions by the court, the Commonwealth, and Buchanan's trial attorneys show that all parties complied with the law of Virginia. Buchanan's arguments that his attorneys were incompetent in failing to do otherwise is without merit. Further, given the circumstances and the requirements of Virginia law, petitioner cannot effectively argue that he was prejudiced by the conduct of his trial counsel on this issue. Petitioner is not entitled to *habeas* relief based on this claim.

**Claim XIIH: Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.**

The court finds that Buchanan was not deprived of adequate representation because of his attorneys' alleged failure to obtain the written guilt phase verdicts before the sentencing phase of the bifurcated trial commenced. Apparently, petitioner harkens back to the fact that the trial jury found him guilty of both the single capital murder of Douglas McArthur Buchanan, Sr., Joel Jerry Buchanan, Christopher Donald Buchanan, and Geraldine Patterson Buchanan, as well as four first degree murders for each of the victims individually. Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free from multiple punishments for the same offense. Counsel's alleged ineffectiveness is contended to have arisen from petitioner's trial counsel failing to cure the verdict "defect" before Buchanan was sentenced to death by the jury.



Any defect resulting from petitioner's conviction of both the greater capital offense and the lesser murder charges was cured by the courts of the Commonwealth. See Buchanan, 384 S.E.2d at 772. Petitioner was simply never entitled, at any time, to pick and choose among the several jury verdicts – "keeping" the first degree murder convictions and "throwing out" the one for capital murder. When a defendant is convicted of lesser included offenses and a greater offense at the same trial, the proper remedy under Virginia and federal law is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction for the greater crime. Brown v. Commonwealth, 279 S.E.2d 142, 145 (Va. 1981), citing United States v. Buckley, 586 F.2d 498, 505 (5th Cir. 1979). The Virginia Supreme Court has already corrected the situation by vacating the first degree murder conviction for the killing of petitioner's father. Buchanan, 384 S.E.2d at 773. Thus, even if everything Buchanan contends is true about counsel's deficient performance, the correction made by the state supreme court leads to the conclusion that petitioner has suffered no prejudice under Strickland.

**Claim XIIIA: The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.**

At the end of his petition, Buchanan alleges that the court and the prosecution committed several other constitutional violations. Included in these claims is petitioner's assertion that the trial court violated his sixth, eighth, and fourteenth amendment rights when it refused to allow petitioner to undergo additional neurological testing following the trial and sentencing phase of the capital murder conviction. Specifically, Buchanan sought at his

sentencing hearing[31] to be tested for a rare form of epilepsy that some psychologists believe may be linked to abnormal and violent behavior in young people. He now claims that the trial court's denial of his request to undergo testing for this particular disorder unconstitutionally deprived him of potential mitigating evidence.

The Commonwealth retorts that a criminal defendant does not have a federal constitutional or state statutory right to "shop around" for an expert that will present the most favorable opinions. See Pruett v. Thompson, 771 F.Supp. 1428, 1441 (E.D.Va. 1991); see also Poyner v. Murray, 964 F.2d 1404, 1418-20 (4th Cir.), cert. denied, -- U.S. --, 113 S.Ct. 419 (1992) (attorney's failure to look for psychiatrist willing to testify to psychological disorder does not constitute ineffective assistance). The government also explains that in this case, Buchanan underwent a complete neurological examination and diagnosis prior to his trial. Petitioner's request for additional testing was based upon an article in the American Journal of Psychiatry that was published shortly after his sentencing. The article was admitted into evidence during petitioner's sentencing hearing. Petitioner's psychiatric expert also testified at the sentencing hearing that the opinion expressed in the article -- the idea that temporal lobe epilepsy may produce violent behavior in young people -- is a controversial position among experts on epilepsy. Given this background, the Commonwealth asserts that the issue presented by petitioner is an evidentiary matter only, and does not raise a federal or constitutional issue.

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[31]Buchanan's sentencing hearing was conducted on August 19, 1988. At that time, the court considered the pre-sentencing report that was prepared for all the convictions other than the capital murder conviction, and the post-sentencing report regarding the capital murder conviction. Petitioner's trial counsel presented a motion for additional neurological testing, arguing that the court's ruling on the motion could affect its consideration of both the pre-sentencing and the post-sentencing reports.



Petitioner argues that he should have the opportunity to present all of the possible mitigation evidence available to him. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, J.) (because the death penalty is qualitatively different than other forms of punishment, the sentencer should not be precluded from considering any aspect of the defendant's character, record, or circumstances of the offense as a mitigating factor). Petitioner also relies upon Ake v. Oklahoma, 470 U.S. 68 (1985) in asserting that the court's refusal to permit the additional psychological testing was a violation of constitutional rights.

The Ake case, however, involved circumstances markedly different from petitioner's situation. In that case, the defendant was suspected of suffering from a severe mental illness. Following the defendant's arraignment, the court ordered him to be examined by a psychiatrist to determine whether he was competent to stand trial. 470 U.S. at 71. The defendant was initially deemed incompetent to stand trial, but when a course of drug treatment was administered, the defendant stabilized and proceedings against him were resumed. Id. at 71-72. The defendant's attorney informed the court that he wished to pursue an insanity defense, and requested that the court arrange for a psychiatrist to examine the defendant. Id. at 72. The trial court refused, and the defendant was convicted of two counts of first degree murder and two counts of shooting with the intent to kill. Id. at 72-73. At the sentencing phase, the government presented the testimony of the state psychiatrists who had conducted the initial examination of the defendant following the killings. Those experts testified as to the defendant's future dangerousness. The defendant did not have expert psychiatric testimony to rebut this evidence or to present evidence in mitigation. Id. at 73. The United States Supreme Court took up the issue of whether the defendant should have been provided with a psychiatric

examination on the defendant's direct appeal. The Court reversed the conviction, holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Id. at 74. In arriving at its conclusion, the Court reasoned that criminal defendants should have a fair opportunity to present his defense, and that a state's interest in conserving state funds should not come at the expense of fair and accurate criminal proceedings. Id. at 83. The Court did limit its holding, however, to cases in which the defendant's mental condition is seriously in question. Id. Where the defendant's mental condition is at issue, the Court found that the defendant should be "fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

In the present case, the court is of the opinion that the requirements of Ake were met when Buchanan received a complete psychiatric examination and diagnosis before going to trial. The psychiatric assistance provided to Buchanan allowed him to determine the viability of an insanity defense, and permitted him a fair opportunity to present mitigating evidence during the sentencing phase of his trial. Ake does not require the state to provide criminal defendants with unlimited opportunities to explore any and every psychological condition that could potentially produce mitigating evidence.[32] In this case, the court believes that Buchanan

[32]In fact, the Ake Court specifically determined that its "concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel, we leave to the States the decision on how to implement this right." 470 U.S. at 83. In this case, the Virginia Supreme Court determined on direct review that the trial court did not abuse its discretion in denying additional testing; this court assumes that this decision reflects the law of Virginia.



had a fair opportunity to present the jury with enough evidence of his mental condition to allow it to make a reasonable determination of sentence.

Also as part of this claim, petitioner makes the bald assertion that the trial court denied him his constitutional rights by refusing to allow Dr. Jerome G. Miller to testify as to the interviews he had conducted in preparing his evaluation of Buchanan. The court also refused to allow Dr. Miller to testify on the medical positions and writings of Dr. Jonathan H. Pincus, who authored the article in the American Journal of Psychiatry about the potential effects of temporal lobe epilepsy, and refused to admit letters written to Dr. Miller from Dr. Pincus and Dr. Breeshire. Buchanan argues that, as a result, he was unconstitutionally denied the right to present mitigating evidence at his sentencing hearing. The record reflects, however, that both Dr. Miller and Dr. Brown were allowed to testify as to their observations about Buchanan and to give their opinions on whether additional testing was likely to uncover further mitigating evidence. The evidence that was excluded by the trial court consisted of hearsay statements and the opinions of other doctors who had never examined petitioner. The court is of the opinion that this evidence was not itself evidence of mitigation, and that Buchanan was able to present all the reliable and relevant mitigation available to him at the sentencing hearing. The trial court's evidentiary decisions in this case did not deprive petitioner of his constitutional rights.

**Claim XIIIB:** **The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.**

Buchanan raises this claim under the Eighth Amendment, which bars arbitrary and capricious imposition of the death penalty and prohibits procedures which needlessly undermine the reliability of the capital sentencing process. See Johnson v. Mississippi, 486 U.S. 578, 584 (1988)(special need for reliability in capital case); Beck v. Alabama, 447 U.S. 625, 638 (1980); Gregg, 428 U.S. at 189. Buchanan argues that withholding information about his parole eligibility left the jury with a distorted view of the penalty choices, making their decision for death unreliable.[33] In the absence of the requested instruction, he contends, the jury could have formed the impression that if they did not sentence Buchanan to death, he would soon be out in society again.

The court finds no merit to Buchanan's Eighth Amendment claim. The United States Supreme Court has held that federal courts generally must defer to a state's determination about what a jury should and should not be told at sentencing about the defendant's prospects for parole, pardon or sentence commutation. California v. Ramos, 463 U.S. 992, 1013-14 (1983). And as the Virginia Supreme Court noted in affirming Buchanan's death sentence on direct appeal, Virginia juries are to impose an appropriate sentence under the applicable criminal statutes without regard for what might happen to that sentence later, such as possible sentence commutation or parole release. Buchanan, 384 S.E.2d at 774. See also Poyner v. Commonwealth, 329 S.E.2d 815, 828, (Va.), cert. denied, 474 U.S. 865 (1985); Turner v.

[33]Had Buchanan received four life sentences for the murders under the law in force at the time of the killings, he would likely not have been eligible for parole consideration until he had served at least twenty years in prison. See Va. Code Ann. §53.1-151(D).



Commonwealth, 273 S.E.2d 36, 47 (Va. 1980). This Virginia rule precluding jury consideration of parole in sentencing has been upheld by the United States Court of Appeals for the Fourth Circuit against constitutional challenge in cases similar to Buchanan's.[34] See Peterson v. Murray, 904 F.2d 882, 886-87 (4th Cir.), cert. denied, 498 U.S. 992 (1990) and Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985), rev'd on other grounds sub nom Turner v. Murray, 476 U.S. 28 (1986).

In any event, the court finds no basis upon which the jury was misled by the lack of the desired instruction in Buchanan's case. Had the jury sentenced Buchanan to life instead of death, he would have been eligible for parole and, although twenty years imprisonment is a long time, he was a young man at the time of sentencing, only twenty years old. The common sense interpretation of "life sentence" left to the jury in the absence of a specific instruction about Buchanan's parole eligibility may have benefited Buchanan, letting the jury speculate that four life sentences plus the years on the firearms offenses would keep him in prison until he was an old man. Moreover, the jury imposed the death penalty based on its finding that the murders were vile, not on a finding that Buchanan was a future danger to society. As parole release is only relevant to the aggravating factor of future dangerousness, it is inconceivable

[34]In their discussions of this claim, both parties have mentioned Simmons v. California, 114 S.Ct. 2187 (1994). The court does not find this case to be controlling of the relevant issues in Buchanan's case. Although the United States Supreme Court, in Simmons, recognized a limited, due process right to a parole ineligibility instruction in capital sentencing, only two justices on the Simmons court would have found an Eighth Amendment right to the instruction in all death penalty cases, while six justices noted the continued viability of California v. Ramos and the right of the state in most cases to determine proper jury instructions on parole eligibility. 114 S.Ct. at 2196, 2200 (O'Connor, J., concurring).

Buchanan's case is also factually distinguishable from Simmons. If sentenced to life instead of death, Simmons would never have been eligible for parole, and the jury specifically found future dangerousness as the aggravating factor making Simmons eligible for the death sentence. Simmons, 114 S.Ct. at 2190-91. Buchanan, on the other hand, would have been eligible for parole in approximately thirty years on multiple life sentences, and the jury in his case was not even instructed on future dangerousness as a possible aggravating factor.

that knowing Buchanan's parole eligibility would have changed the jurors' minds about the vileness of the crime. This claim must be dismissed accordingly.

**Claim XIIIC:** **The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.**

Counsel wanted to make a general statement to the venire persons about the *voir dire* process, but the trial court refused their request. This claim does not withstand the respondent's motion. The only real issue with respect to jury panel questioning is whether the trial judge's *voir dire* was sufficient to impanel an impartial jury. United States v. Larouche, 896 F.2d 815, 830 (4th Cir.), cert. denied, 496 U.S. 927 (1990). Further, defense counsel were presented with an adequate opportunity to engage the venire persons themselves. At Buchanan's trial both sides were permitted to question the prospective jurors individually, and at length. In addition, there is no constitutional requirement that a trial judge submit any specific form or other statement proffered by the defense counsel to the jury. See United States v. Bakker, 925 F.2d 728, 733-34 (4th Cir. 1991). Thus, this claim fails on its merits as well.

**Claim XIIID:** **Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.**

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of Slayton. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, Justus, 897 F.2d at 713, Buchanan has failed to



show cause for his default of this claim, and this court is barred from considering it on the merits. See Coleman, 501 U.S. at 750.

**XIIIE.** **Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.**

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of Slayton. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, Justus, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. See Coleman, 501 U.S. at 750.

Buchanan has moved for discovery of these tapes. However, inasmuch as the court has found the claim to be barred from federal *habeas* review, the court also finds discovery in conjunction with this claim to be unwarranted. Buchanan's discovery motion must be denied.

## V. CONCLUSION

In accordance with the foregoing, it is the opinion of the court that the Commonwealth's motion to dismiss must be granted and that Buchanan's petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, must be denied. After full review of the record and arguments, the court finds petitioner's claims to be either procedurally barred from review by this court or without merit. Because no genuine issues of material fact remain in dispute, the court finds no justification for an evidentiary hearing. As petitioner is not entitled to relief

upon any claim presented, the entire petition must be denied. An appropriate order shall be entered this day.

Petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for respondent.

ENTER: This 25th day of January, 1996.

James C. Turk
UNITED STATES DISTRICT JUDGE





UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 27, 1997

No. 96-4
CA-93-306-R

DOUGLAS MCARTHUR BUCHANAN, JR.

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA

Respondents - Appellees

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On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

## RELEVANT CONSTITUTIONAL PROVISIONS

**U.S. Const. Amend VIII.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

**U.S. Const. Amend XIV, § 1.** All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## RELEVANT STATUTORY PROVISIONS

**21 U.S.C. § 848(j) Continuing Criminal Enterprise - Proof of aggravating and mitigating factors.** Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (E) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

**Va. Code Ann. § 19.2-264.4B Sentence proceeding. --B.** In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.



Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii), the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

**LA. CODE CRIM PRO. art. 905.3. Sentence of death; jury findings**

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

**MO. ANN. STAT. § 565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized**

1. In all cases of murder inidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record o be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting

attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

ions of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;

(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo;

(17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

**S.C. CODE ANN. § 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.**

***

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44- 53-440, or 44-53-445; or

(h) physical torture.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent, or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of anothely impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

The jury, if it does not recommend death, after finding an aggravating circumstance or circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge share dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

**KY. REV. STATE. ANN. § PRESENTENCE HEARINGS; AGGRAVATING OR MITIGATING CIRCUMSTANCES; INSTRUCTION TO JURY**

(2) In all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

1. The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

2. The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree;

3. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one (1) person;

4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;

5. The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;

6. The offender's act or acts of killing were intentional and resulted in multiple deaths; and

7. The offender's act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties;

(b) Mitigating circumstances:

1. The defendant has no significant history of prior criminal activity;

2. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime;

3. The victim was a participant in the defendant's criminal conduct or consented to the criminal act;

4. The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime;

5. The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor;

6. The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime;

7. At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and

8. The youth of the defendant at the time of the crime.

(3) The instructions as determined by the trial judge to be warranted by the evidence or as required by KRS 532.030(4) shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, or imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty--five (25) years of his sentence, shall designate in writing, signed by the foreman of the jury,

the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases, the judge shall make such designation. In all cases unless death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed.

**Ill. Rev. Stat. ch. 5/9-1. First degree murder--Death penalties--Exceptions--Separate hearings-- Proof--Findings--Appellate procedures--Reversals**

**(c) Consideration of factors in Aggravation and Mitigation.**

The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.